United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,727

360

ALTON D. YOUNG, Appellant,

v.

WALTER E. WASHINGTON, Commissioner
of the District of Columbia, Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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ISSUES PRESENTED FOR REVIEW

I. Whether a Metropolitan Police Officer with no off-duty injuries or illnesses of consequence, if any, and a good service record with no derelictions, who had sustained many on-duty injuries, including head injuries, causing varied symptoms including chronic headaches, dizziness, fainting spells, temporary loss of vision, insomnia, growing irritability, "post concussion syndrome", etc. over a period of years, necessitating multiple hospitalizations, X-rays, other medical tests and examinations and treatment by numerous physicians, (including psychiatrists) at the Police Clinic as well as by outside specialists, which resulted in excessive sick leave and much "light duty", after which he was involved in an <u>off-duty</u> on-leave incident resulting in a trial board guilty finding (which is clearly erroneous), and he is found disabled for duty by the Police Department Psychiatrist, does the officer have vested rights which at the very least require that he be considered for disability retirement by the BPFS and/or the Retirement Board before removal from the force because of said adverse trial board finding?

II. Whether a D.C. Metropolitan Police Officer, who while OFF DUTY AND ON LEAVE, is involved in a "scuffle" in a restaurant in Maryland where he and his wife had gone for a crab dinner, at a time when he was not in police uniform, was not performing or attempting to perform

police duties or functions, was not acting or assuming to act as a police officer in any manner, and in which state he had no authority whatever to perform police functions or exercise police authority, and while thereafter being questioned by a Metropolitan Police superior officer regarding said "scuffle", makes an untrue statement relating to said "scuffle" (namely denying he had conversed with the Prince George's County Police Officer who came to the scene) for the purpose, among others, of protecting the said Prince George's County Police Officer from possible reprimand, etc., and which untrue statement he later voluntarily corrected, and which "scuffle" and untrue statement result in trial board charges against him, can legally be found guilty by a D.C. Metropolitan Police Trial Board on a Charge of:

> "Willfully and knowingly MAKING an UNTRUTHFUL STATEMENT in a verbal or written report PERTAINING TO HIS OFFICIAL DUTIES as a METROPOLITAN POLICE OFFICER, intended for the information of a superior officer, in violation of Chapter XXXV, Section 22(f) of the Manual of the Metropolitan Police Department",

particularly where he is acquitted and exonerated of all other trial board charges except the one based on the foregoing "untrue statement".

III. Whether the Trial Court:

1. Confused "Disability Retirement" with "Optional Retirement" and at least impliedly found an obligation on the officer to apply for disability retirement, when there is no known provision

that an officer apply for disability retirement, and both the D.C. Code and the Police Manual indicate that it is the function and obligation of the Board of Police and Fire Surgeons to report and recommend consideration for disability retirement to the Retirement Board?

2. Erroneously found that there was "nothing in the record" which should have caused the Trial Board to raise sua sponte the question of Young's disability particularly in view of the numerous accident reports, medical reports, summaries of hospital records, etc., in the record set forth in the "Statement of the Case" herein; (all of which were admitted in evidence at the trial)?

3. Erroneously approved the Trial Board, Commissioners, etc. on the guilty finding on the "untrue statement"?

IV. Whether, in view of the finding of disability for duty by Dr. Shapiro, the psychiatrist member of the BPFS, and the strong if not conclusive indications of disability incurred in the line of duty, and particularly in view of the very favorable and liberal attitude of this Court in retirement cases generally, it was the duty of the Board of Police and Fire Surgeons, at the very minimum, to conduct a medical survey and report their findings on Officer Young's condition to the Retirement Board, prior to his involuntary removal from the force because of an adverse Trial Board Finding?

V. Whether the BPFS policy existing in cases where a man is facing trial board charges (especially in psychiatric cases) of taking no action towards recommending retirement until the charges are disposed of, is a wise and valid policy, and in particular, where the psychiatrist member of the BPFS has found such an officer disabled for duty, is the foregoing policy or any other reason, a satisfactory excuse for failing to make such recommendations after the Trial Board charges have been heard and determined?

This case has not previously been before this Court under this or similar title.

REFERENCE TO RULINGS

The adverse rulings and findings which appellant requests the Court to review are contained in the following:

1. The 'Findings and Recommendation' of the Police Trial Board, dated September 19, 1962 (JA 51) (PX 9, Item 6) which:

As to Charge No. 1 (two specifications of maltreatment or assault on Graff), found Young "Not Guilty" on both specifications;

As to Charge No. 2, one specification of making an untruthful statement in a 'report pertaining to his official duties as a Metropolitan Police Officer...", found Young 'Guilty'.

As to Charge No. 3, conduct prejudicial to the Police Force, Specification No. 1, seeking out a person knowing that such action would likely result in an altercation prejudicial to the reputation of the police force, found Young 'Not Guilty", and as to Specification No. 2, failing to act properly as a police officer and clarify his participation by reporting the incidents to the police of the area, etc. found Young 'Guilty". (Note: the full text of the charges and specifications are set forth at JA 50A, B, PX 3, Item 5).

2. The Commissioners' Order, dated April 15, 1963 (JA 52) (PX 3, Item 4), affirming the aforementioned Trial Board 'Findings and Recommendation'.

3. The Decision of the United States Civil Service Commission, Appeals Examining Office, dated August 30, 1963 on appellant's "Appeal of removal. . .", which overruled the Trial Board and Commissioners on the finding of "guilty" on Charge No. 3, Specification 2, and sustained the only remaining "guilty" finding on Charge No. 2, the untruthful statement in a "report pertaining to his official duties..."

4. (And Primarily) the "Findings of Fact, Conclusions of Law and Order' of the District Court filed December 14, 1967. (JA 0.11 etc),which, in effect, affirmed foregoing items 1 - 3, above.

I N D E X

TABLE OF CASES

OTHER REFERENCES

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*Cases chiefly relied upon are marked by an asterisk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,727

ALTON D. YOUNG,

Appellant,

v.

WALTER E. WASHINGTON[1]
COMMISSIONER OF THE DISTRICT OF COLUMBIA,

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court Below.

This is an appeal from a final judgment of the United States District Court for the District of Columbia, after trial before the Court sitting without a jury, dismissing the complaint on December 14, 1967. This appeal was originally filed on January 29, 1968 by the

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[1]By order of this Court dated February 28, 1969, Walter E. Washington, et al., Commissioner of the District of Columbia, was substituted for original Defendant-Appellees, as their successor, but references in this brief will be made to "appellees" rather than "appellee", and "commissioners" rather than "commissioner".

appellant pro se. On August 12, 1968 the appellant pro se moved for leave to further prosecute the appeal without prepayment of costs and for appointment of counsel. On August 19, 1968 the appellees filed their motion to dismiss the appeal (because of untimely notice) and opposition to the motion for leave to prosecute the appeal without prepayment of costs. On September 9, 1968, by per curiam order, this Court directed that appellees' motion to dismiss be held in abeyance and the record be remanded to the District Court for consideration of whether an extension of time to note the appeal should be granted and whether permission to proceed in forma pauperis should be granted. After remand to the District Court and appellant's motion there, the District Court granted appellant's motion to enlarge time to appeal to and including November 20, 1968. On November 1, 1968, the District Court entered an order granting appellant leave to prosecute the appeal in forma pauperis and appellant's motion for the transcript to be furnished at the expense of the United States certifying that "said appeal is not frivolous but presents a substantial question...." On November 14, 1968 a second notice of appeal was filed. On December 4, 1968 this Court denied the Commissioners' motion to dismiss this appeal.

The complaint[2] filed in the Court below was for a Mandatory Injunction Directing the District of Columbia Commissioners to Set Aside the Dismissal of the Appellant from the Metropolitan Police Department and to Enter An Order Requiring the Police and Firemen's Retirement Relief Board to Review and Consider the Medical Record in Order to Determine Whether the Appellant Qualified for Disability Retirement from the Metropolitan Police Department. The complaint alleged in substance that the District of Columbia Commissioners had acted arbitrarily and capriciously in affirming an order of the Police Trial Board recommending appellant's dismissal from the Metropolitan Police Department for misconduct which was alleged to have occurred on July 10, 1962, which was later affirmed by the United States Civil Service Commission, in view of the fact that the officer's medical history and records showed that he had been injured on numerous occasions in line of duty while a member of the Metropolitan Police Department which injuries were so severe and his condition such that they would entitle him to a medical disability retirement prior to the date of the alleged misconduct of July 10, 1962.

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[2] The pertinent pleadings are set forth in the simulated "Joint Appendix" as follows: Complaint (JA 0.03); Answer (JA 0.04); Pre-Trial Order (JA 0.05); Findings of Fact and Conclusions of Law (JA 0.11), and the page following JA 0.14 is "JA 1".

B. Statement of Facts Relevant to the Issues Presented for Review.

1. (Appellant was medically examined and found "OK for Appointment" and after one year "OK for Promotion", had a good efficiency record and sustained many injuries including head injuries and assaults in line of duty)

October 9, 1950 - Appellant's date of appointment to the M.P.D. dates from October 9, 1959, but he was in U.S. Army until July, at which time he re-applied, re-qualified, and later went on active police duty.

November 7, 1952 - Medical survey report on appellant by Board of Police and Fire Surgeons (hereinafter sometimes referred to as BPFS) finding appellant "OK for Appointment" (JA 1).

November 10, 1952 - Young was appointed to Metropolitan Police Department (See entry for October 9, 1950 above).

November 9, 1953 - Probationary report of Captain Alexander S. Douglas (1 year on the force) showed Officer Young to be exceptional in many respects and stated as follows: "Always punctual", "exceptionally neat and clean" - "above average interest", "always prompt", "exceptionally reliable' .... "exceptionally industrious and diligent' - 'exceptionally courteous and tactful", "good judgment - no disciplinary measures and no derelictions", "service good....advance". (JA 2A, B)

October 6, 1953 - Medical survey report on police officer after first year of service finding him 'OK for Promotion' and indicating 'Sick record: 0", (meaning he had taken no sick leave). (JA 3A)

October 24, 1953 - April 26, 1963 - Officer Young's Master Sick Leave Card for this period shows many of the injuries and conditions for which he was attended at the Police and Fire Clinic, and for which he received sick leave (Plaintiff's Exhibit 4 at the trial) (JA 3B, C). His "Assignments. . ." 11-10-52 through 10-10-62 (JA 3D, E)

August 28, 1954 - (Injury on duty - JA 4) 'Report of injury to member of Metropolitan Police force' PD Form 42 states in part: ". . . while James Olen Mills, white, 44 years, no fixed address was being booked on a drunk charge Mills became disorderly and struck Private Young in the face. . .was charged with assault on police officer. This injury was incurred while on and in the actual performance of duty." Appellant treated at Emergency Hospital. X-rays negative. (JA 4)

October 13, 1954 - Captain Thomas Rasmussen's report of appellant's second period of service shows in part. "always punctual", "exceptionally neat and clean", "above average interest", "always prompt", "exceptionally reliable", 'good judgment", not "subjected to any disciplinary measures", no "derelictions", "service is good" and "advance" (JA 5A, B).

November 25, 1954 - (Injury on duty - JA 6) PD Form 42 shows in part: "..hile waiting for the patrol wagon the above four white men assaulted Pvt. Young causing a bruise to his right eye. Pvt. Young was transported to Episcopal Hospital. . . the four men were charged at 1st Precinct with...assault on a policeman. The above injury was incurred in actual discharge of duty." (JA 6)

September 4, 1955 - (Injury on duty - JA 7) Struck by prisoner. PD Form 42 states: "...Pvt. .lton D. Young...was struck in the nose by Edward J. Dore...who was being booked for drunk when Pvt. Young tried to subdue Dore he struck Young several times about the head and body. . . This injury occurred while in the actual discharge of duty and while on duty. Taken to Emergency Hospital where he was treated...for a bruised nose and a bruised right hand..." (JA 7).

January 22, 1956 - (Injury on Duty - JA 8) PD 42 states in part. "...a Marine...became disorderly and was placed under arrest by Pvt. Young. At this time the Marine struck Pvt. Young...when in the street the Marine again struck Pvt. Young in the face and threw him to the ground...the Marine was charged with assault on policeman, drunk, and disorderly...above was incurred while on duty and in line of duty. Pvt. Young was transported to Emergency Hospital in Scout No. 11 and X-rays negative". (JA 8)

June 27, 1956 - (Injury on Duty - JA 9) Maintaining an arrest. PD 42 states in part: '... the above officer...arrested Leslie . Hawthorne, white, no fixed address, for drunkenness. Hawthorne resisted arrest and during struggle to maintain the arrest and to protect himself from injury Officer Young injured his right hand causing a slight swelling...to Emergency Hospital for X-rays.... Above injury was incurred while on duty and in the actual performance of duty.' (JA 9)

March 11, 1957 - (Injury on duty - JA 10) PD 42 states in part: ". . . Pvt. Young . . . while opening the left hand door the wind blew the right hand door closed. As the door closed it caught Pvt. Young's right hand injuring same. He was taken to Emergency Hospital. . . and treated. . . for contusion to right hand and swelling. . .this injury was incurred while on and in the actual performance of police duty. . .X-rays negative.' (JA 10)

September 15, 1957 - (Injury on duty - JA 11-12) PD 42 shows 'contusions to right side of face' "assaulted by a prisoner...while in process of searching the prisoner the above was struck about the right side of the face by the fist of the prisoner Robert Duffy... Pvt. Young was transported to Emergency Hospital...and treated...

for contusions to right side of head...injury was incurred while on duty and in actual discharge of duty" (JA 11). Dr. J. Blaine Harrell in his note dated September 16, 1957 stated: 'On 9/15/57 struck in area of tempero-mandibular joint by fist, dazed but not unc. Today jaw functions well hearing equal but still has some h.a. (headache), particularly on rapid motion of head, imp. mild concussion. JBH" (JA 12)

2. (On October 28, 1957 Officer Young while operating a police vehicle on duty sustained a concussion and severe injuries when the police vehicle while stopped was struck in the rear by a D.C. Transit bus necessitating hospitalization on a number of occasions, severe headaches, vision difficulties, dizzy spells, fainting spells and other symptoms, excess sick leave, and he was attended and examined for these conditions by many different physicians including several neuro-surgeons and a neuro-psychiatrist.)

October 28, 1957 - (Injury on Duty - JA 13) PD 42 shows: 'Injury to head - traffic accident on duty. About 12:10 Monday, October 28, 1957 Pvt. Alton D. Young...while operating a 1950 Ford panel truck...while stopped for a vehicle in front of the said patrol wagon, was struck in the rear by a D.C. Transit bus...Pvt. Young was removed from the scene of the accident to Emergency Hospital in ambulance 81-A...treated and admitted by Dr. Oort of Emergency Hospital and Dr. J. Blaine Harrell of Police Clinic for observation. This injury was incurred in the line of duty and the

actual discharge of duty...treated for concussion..." (JA 13)

October 28, 1957 - (X-ray - JA 14) "X-ray examination of skull shows no evidence of fracture or other abnormality." (JA 14)

October 30, 1957 - (Dr. Hugo V. Rizzoli - JA 15A, B) Officer Young was seen in consultation by Dr. Hugo V. Rizzoli a neurosurgeon who stated in part: (JA 15A, B) "History: This 28 year old policeman was involved in an accident on 28 October 1957 just after midnight. Apparently the police wagon he was driving was at a standstill when it was struck in the rear by another vehicle. Patient believes h· was not rendered unconscious and says he struck his head (all emphasis supplied unless otherwise indicated) against some portion of the vehicle but does not know what part. He believes he struck his forehead against the steering wheel. He complains of generalized headaches, dizziness and neck pain. X-rays of the skull were taken and are negative. . . . Impression: 1) mild head injury with post-traumatic syndrome; 2) cervical spine strain. Recommendations: 1) sparine 25 mgs 3 times a day; 2) X-rays of the cervical spine." (JA 15A, B)

October 28 - November 4, 1957 - (Emergency Hospital - JA 37A)

Officer Young was confined to Emergency Hospital during this period for the above accident. Dr. Hyman D. Shapiro in connection

with his 1959 examination after examining this hospital record, etc, in his report dated October 12, 1959, (JA 37A) summarized this hospitalization in part as follows: 'The history given on admission is consistent with that the man had given me. He was slightly dizzy on admission but was stated that the patient can remember generally 'all that happened'. He was alert and cooperative on admission; the diagnostic impression was that of a cerebral concussion. His initial examination in the hospital showed that he was complaining of headaches and dizziness and he showed a 'slight swelling on the forehead'. X-rays of the skull were ordered and these were reported as of 10-28-57 as negative. He was seen in neurological consultation on 10-30-57...the history that he gave was that he struck his head against some portion of the vehicle but does not know what part but believes that he struck his forehead on the steering wheel. He was complaining of general headaches, dizziness and 'neck pains'. It was stated on examination his neck was tender over the lower cervical spine. The impression was that he had a mild head injury with post-traumatic syndrome and (2) cervical spine strain. He was placed on sparin and X-rays of his cervical spine ordered. These were reported as negative for fracture or dislocation on 10-31-57. He is stated to have improved during hospitalization but was discharged to

return to the P & F Clinic for 'follow-ups'. Final diagnosis was that of a mild cerebral concussion and (2) contusion of the left shoulder." (JA 37A)

November 6 - 10, 1957 - (Emergency Hospital - JA 37A) After discharge Officer Young was again admitted to Emergency Hospital on November 6, 1957. Dr. Hyman D. Shapiro who in connection with 1959 examination of appellant examined these records summarized them as follows: (His report of October 12, 1959) (JA 37A, B) "A review of the records of the second admission to Emergency Hospital shows that he was a patient there from 11-6-57 to 11-10-57 four days. His chief complaints on admission were headache and dizziness and soreness of his neck and 'photo-phobia' (This means that his eyes were sensitive to light). It was reported that his headache began in his occipital region today and the headache has persisted. It was stated then his other associated symptoms began. They report that the temperature was taken by his wife and was 104 and the same temperature on admission. The working diagnosis was that of 1) influenza; 2) pos. meningitis secondary to recent injury. On his admission examination it was reported that he was in bed with complaints as above mentioned. He complained of some dizziness in sitting in an

upright position and that the dizziness can be made to occur when tapping his right mastoid process. His physical examination was negative..., it was reported however 'patient does not move much due to headaches and dizziness'. It was thought he had a flu-like syndrome and was believed that his present complaints are unrelated to the past accident. The progress notes of 11-7-57 states he was to be seen by Dr. Rizzoli; however, it was shown that he was seen by Dr. Horowitz, an associate of Dr. Rizzoli. The date of his report is not given. He reports that he was asked to see the man again because of headaches, fever and light-headedness. The man was reported feeling better that morning but still feels 'dizzy'. The doctor found tenderness over his left mastoid region but his neurologic was negative. His impression was that he should be observed for labyrinthin disturbance and recommended for further observation. There is no further report of this consultation. His discharge diagnosis was that they confirmed the diagnosis of the influenza but as regards to possible meningitis they state that this was 'not proven'. He was stated to be improved on his discharge from the hospital but again was returned, "to continue follow-up Police Clinic". (JA 37A-B)

(Dr. Shapiro went on to comment in his aforementioned report (JA 37 B) dated October 12, 1959: "It is to be noted that during this hospitalization that this man was continuing with his complaints of headache and dizziness aggravated by changes in posture and that he does not move much due to his headache and dizziness. In my opinion the influenza would not account for this, but it is quite evident that he was still continuing with the symptoms the result of his original cerebral concussion. (All emphasis supplied) The photo-phobia is interesting in view of his subsequent eye symptoms. It could have been definitely related to his recent head injury. It is doubtful whether the flu could cause this symptom and when occurring with his other symptoms it is my opinion that this is still part of the post-traumatic head syndrome.") (All emphasis supplied) (JA 37 B)

January 13, 1958 - (Excess Sick Leave Granted - JA 16) In a "Report on Excess Sick Leave 1957" dated January 13, 1958 (JA 16) it is shown that Officer Young received 25 days sick leave for the diagnosis 'whiplash inj.to neck - cont to head - post-traumatic headaches - at work (BFD)" and that this was a total excess of 7 days. This form shows that the Chairman of the Board of Surgeons certified

in part: "The Board is of the opinion that the sick absenteeism of the above named officer was a direct consequence of the injury received....in actual performance of duty as contemplated under the provisions of Section 9, Chapter XXXIV of the Policeman's Manual.... the Board therefore recommends allowance of pay for the period indicated." It further shows "that this recommendation was 'Approved' by the Commissioners of the District of Columbia sitting as a Board January 28, 1958, G.M. Thornett, Secretary'. (JA 16)

January 9, 1958 - (Injured on duty - JA 17 - 19) Placing prisoner under arrest - PD 42 (JA 17) states in part: '...Sanders began striking Pvts. Young and Jacobs about the face with his fists. However he was restrained by the officers and taken into custody. In the process of subduing the prisoner Pvt. Young received injuries to both hands. He was treated at the Emer. Hospital...Sanders was charged with two counts of assault on police officer, disorder and also with mental observation. This injury was incurred while on and in the actual performance of police duty.... Treated at Emergency Hospital 1/9/58 for contusions to nose and left orbit. Contusion and sprain both hands. (JA 17) Examination of both hands showed no evidence of fracture and dislocation (JA 18) and examination of nasal bone showed no evidence of fracture" (JA 19).

February 20, 1958 - (Dr. Benjamin Dean - JA 20) On this date Dr. Benjamin F. Dean, Jr., a member of the BPFS reported as follows: (JA 20) 'Pvt. Young gave a history of being injured while on duty October 2[illegible], 1957. He was admitted to Emergency Hospital on that date. The diagnoses were contusion to the head, cerebral concussion, whiplash injury to the neck and post-traumatic headaches. X-rays of the skull and cervical spine taken at Emergency Hospital October 31, 1957 were reported as normal. He was seen in consultation at the hospital by Dr. Hugo Rizzoli, a neuro-surgeon. Pvt. Young was discharged from the hospital November 3, 1957. He received diathermy treatments at the clinic daily except Sundays while on sick leave. Pvt. Young was restored to light duty December 2, 1957 and remained in that status until December 8, 1957 at which time he was placed on regular duty. When last examined January 30, 1958 Pvt. Young stated that he has occasional headaches and dizziness but they are improving." (JA 20)

February 24, 1958 (X-ray Mandible - JA 21) Officer Young X-rayed. 'Examination of mandible shows no fracture'. (JA 21)

June 9, 1958 - (X-ray Hand - JA 22) Appellant X-rayed Washington Hospital Center. "Examination of left thumb shows no evidence of fracture or dislocation. There is a slight bulge in the cortical bone of the distal medial aspect of the shaft of the first metacarpal bone...." (JA 22)

July 5, 1958 - (Dr. Leonard T. Peterson - JA 23) Appellant was examined in consultation by Dr. Leonard T. Peterson, an orthopedic surgeon, who stated in part in a report to Dr. J. Blaine Harrell, Board of Police and Fire Surgeons: 'History: Mr. Young, a D.C. policeman, stated that he had had pain in the left thumb since January, 1958. At that time he was trying to restrain a prisoner while on duty and incurred injury to both hands. He was off duty for a period of 12 days and bandages were required. X-rays had revealed no fracture. Past history indicates that he has had numerous injuries to his hands and injury to his head incurred on duty. Present complaint pain and tenderness at the metacarpophalangeal joint left thumb.... Discussion: This man has had severe sprain to the left thumb with persistent residual symptoms in the metacarpophalangeal joint. The joint was injected with procaine and hydro cortisone in an effort to give relief. If some benefit is derived further injection may be indicated....He still has partial disability of the left thumb....He was seen again 7/7/58 no benefit was derived from the injection. Tenderness at this time was limited to the flexor surface at the M.P. joint suggesting tenosynovitis here. This area was injected. (JA 23)

August 15, 1958 - (Dr. O. Hugh Fulcher - JA 24 A, B) On this date appellant was examined by Dr. O. Hugh Fulcher, a neuro-surgeon, at the request of Dr. James A. O'Keefe of the BPFS. His report was dated September 4, 1958 (JA 24 A, B). In this report he stated in pertinent part: "Chief complaint: dizziness and headache. History: This patient stated he was in good health until October 23, 1957 when he was in an accident. He stated he was riding in a patrol wagon when the accident occurred. Apparently as a result of the accident he struck his forehead on the steering wheel...he had suffered no lacerations but there did develop a large bruised area on the left side of his forehead...he remained off duty a total of 42 days. He was working ever since until August 13 at which time he passed out while at home. He stated he struck his head against the bath tub as a result of this attack of unconsciousness. This patient stated he had suffered four such attacks. He suffered two such attacks while in the hospital and another attack about one month after being discharged from the hospital and the fourth attack occurred on August 13. He stated he had suffered with dizziness and headaches from time to time which had no particular pattern....since this patient has a history of having four attacks of unconsciousness I thought it wise to have him admitted to the hospital. Consequently

he was admitted to Providence Hospital on 8-19-58 and a spinal puncture was performed...an EEG was performed and the patient was discharged from the hospital on 8-24-58. The following is a report of the EEG: '...Summary: Imp: normal'." (JA 24 A, B)

August 19 - 24, 1958 - (Providence Hospital - JA 37 B)

Dr. Hyman D. Shapiro in his report of October 12, 1959 (JA 37 B) reported that he had examined the hospital records of this hospitalization and summarized them as follows: (All emphasis supplied) "The next medical record is from Providence Hospital where he was a patient from August 19 to August 24, 1958. It is to be noted that his chief complaints were given as 'Dizziness and syncopal episodes of eleven months duration.' This is consistent with the history the man gave me. Also it is to be noted that these complaints of headaches, dizziness and syncopal episodes of 'increasing duration, the last of which was 25 minutes in length,' is again consistent with the history that the man has given me. An additional history on this hospital admission, that the man had not given me was that he was showing eye symptoms in that he was reported as having difficulty with his vision blurring and, 'Stars before his eyes.' (This together with the history of photophobia on his second hospitalization at Emergency Hospital, places his eye symptoms earlier than he

had given in his history to me.) In the hospital, his physical and neurologic examination were, negative, with the exception that his optic fundi was stated to show questionable mild congestion of the veins. Because of this and his history a subdural hematoma was suspected. The report furnished me apparently is that of a summary. It is shown that during his hospitalization he had a spinal puncture and an EEG, and the final diagnosis was that of contusion, right frontal scalp and forehead, and post-concussion syndrome. The admission diagnosis was that of a subdural hematoma." (JA 37 B)

(Dr. Shapiro in his report of October 12, 1959 (JA 37 C) p.3 after summarizing Dr. Fulcher's report stated in part: "He was also finally diagnosed by Dr. Fulcher as a post-concussion syndrome. Certainly it would appear that if a man had an attack of unconsciousness sufficient to cause the contusion of his right frontal scalp and forehead and also be considered as a post-concussion syndrome it could not very logically be stated that this was not an 'organic basis'. It is true that the neurologic examination and EEG did not demonstrate any abnormality, but the man did show signs and symptoms consistent with the residuals of a brain concussion and a post-traumatic syndrome.") (JA 37 C)

The bill for the aforementioned hospitalization at Providence Hospital in the amount of $148.00 (JA 25 A, B) and Dr. Fulcher's bill in the amount of $45.00 (JA 25 C) were paid for out of public funds.

November 8, 1958 - (Dr. Ralph Patten - JA 37C) Appellant was examined by Dr. Ralph F. Patten and his report was summarized in Dr. Shapiro's report of October 12, 1959 (JA 37C) as follows: "The next record from Dr. Ralph F. Patten dated October 6, 1959 refers to his examination on 'November 8, 1959.' (Probably a typing error). The man, it is to be noted, was still complaining of his dizziness and syncope. Again there is a consistent history of four episodes of 'syncope,' and that the attacks are preceded by true vertigo. Dr. Patten brings out that the man was discharged from Providence Hospital with a recommendation to take phenobarbital. He records that Mr. Young has been nervous since then and that there has been a change in personality. (It is to be noted that the man did not give me this history..... He confirms the man's statement about finding tenderness of the occipital nerve on the right. He referred the man back to the Police Clinic." (JA 37C)

November 21, 1958 - (Dr. Carl Berg - JA 26A, B) Appellant was examined by Dr. Carl Berg at the request of the BPFS which stated in pertinent part: (JA 26A, B) "I examined Alton Young in my office on November 21, 1958. He reported that in 1957 he had an accident while on duty sustaining a cerebral concussion. He struck his head on a steering wheel...upon leaving the hospital he felt that he was no better than when he entered...in August 1958 he was hospitalized at Providence Hospital...Mr. Young says that he has been the same now for the past year. At the present time he complains of headaches and dizziness. He says that his nerves are "shot". (Emphasis supplied) He has a headache which comes and goes. Sometimes it lasts only a couple of minutes. He has dizziness following the headache. He can sleep only two or three hours a night and is nervous all the time. He has been taking phenobarbital and Vitamin B1 which he thinks has not helped.... Summary: Since other treatments have failed to produce any relief it was considered that his difficulty might be influenced by some abnormality in the cervical spine...would be very glad to give him a short course of treatment including neck traction heat and massage merely on an emperical basis...." (JA 26B)

November 26, 1958 - (Dr. T. M. Foley - JA 27) Dr. T. M. Foley, Jr., by his report dated December 22, 1958 (JA 27) to the Police and Fire Clinic reported in part as follows: "Mr. Young has been under treatment in physiotherapy since November 26, 1958 because of complaints referable to his neck. He states the treatment has helped; however on any lapse of more than two days the headaches recur. The principal finding on examination was tenderness in the right occipital nerve area. One week ago while watching television Mr. Young stated that the vision in his left eye became markedly blurred so that he was only able to see light out of the corner of the eye. He went to Washington Hospital Center and subsequently was seen by Dr. Michael Kennedy....who informed the patient that he could find no abnormality in the eye. It is the opinion that he has received maximum benefits from treatment from an orthopedic standpoint. It is suggested that he have a neurologic evaluation." (JA 27)

December 12, 1958 - (Dr. Leslie E. Sanders - JA 28 A, B) Appellant was examined by Police Department psychiatrist Dr. Leslie E. Sanders who in his medical report dated October 9, 1959 (JA 28 A, B) states in part as follows: "My first consultation with Mr. Young was held on December 12, 1958. At that time he was complaining of headaches, insomnia, irritability and anxiety. He reported that he

also fainted some months prior to this consultation. At the time of this interview Mr. Young felt that I could be of no help to him and I did not see him again. Approximately six months later Mr. Young was referred to me again for consultation. At that time he was suffering from headaches, dizzy spells and had lost partial vision in his left eye. Following our initial interview Mr. Young agreed to see if psychotherapy would be of any benefit to him and I saw him weekly for several weeks. Our sessions were interrupted by my leaving the Clinic staff. In my opinion Mr. Young has emotional problems of some severity. He controls his feelings until the inner tension becomes extreme and then the emotional tension expresses itself in symptoms as those I have described or in some act or rather rash or exaggerated behavior. He has repressed feelings of intense hostility and these feelings are expressed in the negative attitude, a rigidity in his views and a perfectionist tendency. As he himself stated he has always been a perfectionist and would arrest his own father if he did wrong....it is my view that these circumstances were of paramount importance and a development of symptoms although traumatic experiences such as the accident and concussion could further contribute to his emotional stress." (JA 28 B)

(Dr. Shapiro in his consultation dated July 16, 1959 (JA 34 C) states in part: "after that he (appellant) states that a request was made to Dr. O'Keefe some time later for more treatment and he was sent to Dr. Sanders, a Police Department psychiatrist, who saw him seven or eight times and this was discontinued when Dr. Sanders' appointment with the Police Department ran out. He has not seen him since. He states that Dr. Sanders just talked to him and gave him no other treatment than the talks.") (JA 34 C)

December 15, 1958 - Appellant applied for a transfer and change of assignment. Captain John S. Hughes of No. 1 reported that "....Private Young has "the making of an excellent officer..." (JA 29)

January 5, 1959 - (Dr. O. Hugh Fulcher - JA 30) On this date appellant was re-examined by Dr. O: Hugh Fulcher as a consultant who in his report dated January 13, 1959 (JA 30) to the Police and Fire Clinic reported in part as follows: "I examined this patient again on January 5, 1959. He stated that about three weeks previously he had suddenly developed a blindness in the left eye and had remained blind for two and one-half days. After this the vision returned but resulted in a fuzziness on the left side. He stated he had a sensation that someone was creeping up on him from the left. The neurological examination revealed an anxious tired man of about 29 years of age.... Conclusion: It was my opinion that this patient was suffering with emotional conflicts rather than any injury. I thought

that this episode which had consisted of blindness in the left eye of two and one-half days duration must be resulting from hysteria." (JA 30)

January 9, 1959 - In a 'Report on Excess Sick Leave' dated January 9, 1959 (JA 31), it is shown that appellant received seven days excess sick leave (above the 30 regularly allowed) during the year 1958 for various injuries including the sprain to his hands, post-traumatic, syndrome, etc., showing that the injuries and conditions necessitating this were as a direct consequence of the performance of duty and which was stamped "Approved by the Commissioners, District of Columbia, sitting as a Board Jan. 22, 1959" (JA 31).

January 12, 1959 - Appellant X-rayed at Washington Hospital Center "right acromioclavicular articulation in...shows no abnormality". (JA 32)

July 11, 1959 = (Injury on Duty - JA 33) Kicked in groin and human bite to left hand maintaining arrest of prisoner on duty. PD 42 states in part: "...Saturday, July 11, 1959, Pvt. Alton D. Young... placed Kenneth E. Rigsby...under arrest for drunk and disorderly. While maintaining arrest of his prisoner Genevive Rigsby kicked Pvt. Young in the groin four times and bit him on the left hand... was examined by Dr. J. Blaine Harrell, Police Clinic, and continued on sick leave. This injury occurred in actual discharge of duty...treated at Washington Hospital Center 7/11/59." (JA 33)

3. (Officer Young was examined by Dr. H. D. Shapiro, a psychiatrist, in July 1959, and found to be suffering from post-traumatic head syndrome, etc. related to 10/27/57 on duty accident, was examined by other medical specialists, one finding an emotional depression, and sustained additional on duty injuries.)

July 16, 1959 - (Dr. H. D. Shapiro - JA 34 A - D) Young was privately examined by Dr. Hyman D. Shapiro, a neuro-psychiatrist re civil claim. His chief complaints at this time were "headaches and dizziness since an accident on October 28, 1957". Dr. Shapiro reviewed and summarized his "family history", "previous history", "previous illnesses", "present illnesses", "present complaints" and gave him a neurologic examination and rendered a diagnostic impression of "post-traumatic head syndrome? post-traumatic neurosis". He withheld his final diagnosis and recommendation pending receipt of other medical data. (JA 34 A-D)

September 3, 1959 - (Injury on duty - JA 35) Laceration to forehead, sprained right wrist maintaining arrest of prisoner on duty. PD 42 for September 3, 1959 shows that Officer Young was "struck in the chest and forehead by fists of Johnson. He later went to the Washington Hospital Center and was treated by Dr. Benjamin F. Dean for contusion and bruises to the right hand and lacerations and contusions to the forehead...reported to Police and Fire Clinic on September 3, 1959 and was again examined by Dr. Benjamin F. Dean.

Remained on sick leave. His injury was incurred in the line of duty. X-ray examination Washington Hospital Center reported 'examination of skull and right hand shows no evidence of fracture or other abnormality". (JA 35)

October 7, 1959 - (Dr. Leon Yochelson - JA 36 A - C) On this date Officer Young was examined by Dr. Leon Yochelson, a psychiatrist on behalf of the D.C. Transit, Inc., the defendant, in a civil case filed on behalf of Appellant Young as a result of the injury of October 28, 1957. He reported in part: "...he revealed that he had been very irritable toward his wife and children and occasionally to his colleagues at work. Also he had difficulty in falling asleep and recalls occasional pacing during the night. He has increased his tobacco consumption to about three packs in a day...Mr. Young had been a conscientious officer. Stated he graduated second in his police class and that he is looking forward to promotion after taking his examination October 26, 1959....Although Mr. Young stated no complaints about his marriage he indicated that there had been a growing irritability toward members of his family....I informed Mr. Young that his difficulty was not due to any damage of the brain but that he had been suffering from an emotional depression which is due to a considerable amount of strain stemming from the experiences of earlier years and involving some emotional problems of the present." (JA 36A-C)

October 12, 1959 - (Dr. H. D. Shapiro - JA 37 A - D) On this date Dr. Hyman D. Shapiro rendered his report supplementing his earlier report of July 16, 1959 (JA 34 A - D) after he had had an opportunity to examine the various hospital and other medical records. He reviewed the medical records of the officer's hospitalization at Emergency Hospital from 10/28 - 11/4/57 and his subsequent hospitalization at Providence Hospital from 8/19 - 24/58, Dr. Fulcher's reports heretofore referred to (JA 24 A - B, 30), the report of Dr. Ralph F. Patten dated October 6, 1959, Dr. Berg's report of November 22, 1958 (JA 26 A, B) and Dr. Foley's report of December 22, 1958 (JA 27), and concluded in part: "In reviewing all of the evidence reported it is my opinion that Mr. Young is still suffering from the residuals of a cerebral concussion. He presents a rather typical picture of a post-traumatic head syndrome....it may be an organic residual of his original brain concussion. It is a well known fact that individuals can receive a brain concussion and continue to have marked disabling symptoms such as headaches and dizziness and eye symptoms without definite organic neurologic findings or laboratory findings being demonstrated. It is quite evident that this man did receive an injury to his head at the time of his original accident of October 28, 1957. He undoubtedly had a cerebral concussion at that time on the basis of the history given

of being dazed for a period of time after the injury....I do not believe that his attacks of loss of consciousness or "syncope" are fully explained on a basis of a functional disorder....My diagnosis in this case is that of a post-traumatic head syndrome with some superimposed functional nervous symptoms. The latter however could still be part of his organic brain condition. Recommendations: This man when seen by me on July 16, 1959 was still having symptoms of his original head injury of October 28, 1957. (All emphasis supplied) He is still in need of treatment for this condition in my opinion. He should be returned to the Police and Fire Clinic for further treatment of same...." (JA 37 D). At the trial Dr. Shapiro testified (at Tr. 34) "In other words, he had both emotional problems as well as organic problems. He's had a number of blackouts and he's had some, what (that) I feel were hysterical -- temporary hysterical symptoms..." (Tr. 34).

April 11, 1960 - Despite the foregoing difficulties with his health on this date this officer was recommended for a service step increase by the training officer of Precinct No. 5 as a result of "satisfactory performance rating". (JA 38)

July 6, 1960 - (Dr. Carl Berg - JA 39) On this date Young was again examined by Dr. Carl Berg who reported to the Police and Fire Clinic in his report dated July 7, 1960. (JA 39) This examination was related to difficulties which the police officer had with his right hand commencing in September 1959. Dr. Berg reportea in part: "At the present time he complains of loss of strength in use of the right hand...pain and aching in character principally over the ulnar portion of the hand. Examination: There is some generalized thickening about the fifth metacarpophalangeal joint at which site the synovium appears to be hydatrophied. There is tenderness to pressure over the shaft of the fifth metacarpal especially at its distal half....X-rays....on July 6, 1960 showed no evidence of fracture or bone disease. Summary: There appears to be a chronic synovitis of the fifth metacarpophalangeal joint with possible involvement of the extensor tendon sheath. I would recommend that hydrocortone injection be given with immobilization of the affected part for probably about two weeks". (JA 39)

August 31, 1960 - (Injury on Duty - JA 40) Injury maintaining an arrest of prisoner on duty. PD 42 for this date states in part: "While maintaining arrest of the subject Pvt. Young suffered contusions to the right hand and right index finger.... reported to the Police and Fire Clinic where he was examined by

Dr. Benjamin F. Dean and treated for contusions of the right hand and right index finger....ordered on sick leave. This injury was incurred in the actual performance of duty and while on duty.... contusion and chip fract. 2nd digit rt. hand...."

4. On September 23, 1960, Officer Young already suffering with complaints of headaches, depression, irritability, etc. was severely injured when, while stopped in a police cruiser on duty, the police vehicle was severely struck in the rear by another vehicle knocking it forward into two other vehicles, the impact being so severe that the seats of the police cruiser were broken off and appellant sustained a further concussion, whiplash and back injury, and in January, 1961, Dr. Williams, a neurosurgeon, recommended a psychiatric examination by Dr. Shapiro, Police Psychiatrist, which was not done.

September 23, 1960 - (Injury on duty - JA 41) On this date appellant was a passenger in a police cruiser operated by another officer which while stopped on Virginia Avenue, S.E. was severely struck in the rear knocking police cruiser into two other vehicles ahead of it and appellant and the other officer in the vehicle sustained a "concussion, whiplash and back injury....condition fair. Placed off duty sick" (JA 41)

September 23 - October 7, 1960 - (Casualty Hospital, Dr. J. Blaine Harrell - JA 42 A - C) Appellant was hospitalized at Casualty Hospital for this period for the above mentioned injuries. He was under the care of Dr. J. Blaine Harrell who in his report dated August 22, 1961 (JA 42 A - C) made an entry dated September 23, 1960 in which he stated in part that "the impact was stated to be severe causing the seat to be torn from its attachments. He was admitted to Casualty Hospital where I first examined him. At the time of my examination he was lying in bed with his head in traction appearing to be very uncomfortable. He complained of severe headache, neck ache, back ache and pain in the right elbow and hip.

In his longhand memo dated October 14, 1960 (JA 43 A - B) regarding this accident Dr. Harrell stated "Diagnosis: Severe neck strain and post concuss ha (headache) low back strain, strain right knee and elbow due to w.l. in treated with bed rest sedation traction several days then physio. Released...10/7/60. Today has ha ~~and~~ vertigo sore neck and back and feels nervous....also compl. discomfort lumbar area...Chief compl. is dizziness on getting up etc. To get E.E.G....

October 19, 1960 - (Dr. Harold Stevens - JA 44) The E.E.G. report of Dr. Harold Stevens, M.D., of the electro encephalogram was reported to be within normal limits. (JA 44).

October 21, 1960 - Dr. Harrell reported that the officer felt "improved but does not feel ready for work" (JA 43 B).

October 28, 1960 - Dr. Harrell reported "still doesn't feel well but will try light duty. (JA 43 B)

November 15, 1960 - A "Report of Excess Sick Leave" 1960 (JA 45) showed that appellant received a total of 20 days excess leave during the year 1960 (over the normal 30 days) as of November 15 for various on duty injuries including 27 days of sick leave for "neck strain - L.S. strain, concussion - post conc. headaches - at work which, as previously, was recommended by the Chairman of the Board of Surgeons and approved by the Commissioners of the District of Columbia sitting as a Board November 22, 1960. (JA 45)

January 9, 1961 - Dr. Harrell reported in his report of August 22, 1961 (JA 42 B) "On January 9, 1961 he reported he was doing light duty satisfactory but still felt a daily headache. It was thought wise because of this persistence of headache to order a neurological consultation. He was referred to Dr. Jonathan Williams". (JA 42 B)

January 12, 1961 - (Dr. Jonathan M. Williams - JA 46 A - B)

Officer Young was examined in a neurological consultation by Dr. Jonathan M. Williams on this date and by his report dated January 13, 1961 to Dr. J. Blaine Harrell of the Police and Fire Clinic reported in part as follows: (JA 46 A - B) "I examined Mr. Alton Young in the office on January 12. Officer Young told me that on September 23 he was in a scout car waiting for a light to change when the car was rammed from behind. He was knocked out and suffered several bruises on various parts of his body and was taken to Casualty Hospital. X-rays were taken of his head, his knee and so forth. Following this he was in the hospital approximately 15 days the majority of this time being spent in cervical traction. Since that accident he has had headaches and a sense of nervousness which is getting worse. The headaches begin at the back of the head then at times awaken the patient. Sometimes they are associated with nausea though the nervousness is present at all times.....Officer Young also tells me that in 1957 he was in an almost identical accident and at that time had headaches with nervousness. He was off a total of 160 days as a result of this. On examination I found Officer Young to be a somewhat sullen-looking unsmiling husky man of 31.... I would think it appropriate therefore that your staff neuro-psychiatrist Dr. H. D. Shapiro examine this man and render an opinion." (JA 46 A - B) (There is no indication that this was done)

June 7, 1961 - Officer Young had both hands X-rayed at Washington Hospital Center (JA 47).

June 14, 1961 - (Dr. Carl Berg - JA 48) On this date Young was again examined by Dr. Carl Berg regarding difficulties with his hands and Dr. Berg reported in part as follows (JA 48): "He reported he had no trouble with his right hand until about a month ago when he began having pain in the fifth knuckle and weakness in the hand.... examination: ....injection of novacaine and hydrocortinal was made into the joint and a plastic cast applied immobilizing the wrist with an extension finger to support the fifth finger. This same treatment on a previous occasion over a year ago resulted in relief for about 11 months. (JA 48)

July 18, 1961 - (Dr. Carl Berg - JA 49) Appellant again examined by Dr. Carl Berg who reported in part as follows: (JA 49) "....the cast has recently been removed so that there is likely to be a little residual stiffness for a short time...he was advised to continue with hot soaks and exercise and return in two weeks." (JA 49)

August, 1961 - Young separated from his wife (Tr. 309).

5. (After having sustained many injuries on duty including the severe injuries in the auto accidents of October 28, 1957 and September 23, 1960, and being examined and treated by numerous physicians (both inside and outside the 'Clinic') including orthopedists, neurosurgeons and neuro-psychiatrists for his disabling headaches, dizziness, nausea, post-concussion syndrome, etc., and becoming separated from his wife, Officer Young was charged with police trial board offenses resulting from "off duty" incidents, and as a result was involuntarily removed from the Metropolitan Police Department, although he was found to be disabled for duty by the Police Department Psychiatrist after many examinations, and suit filed requesting Retirement Board Hearing)

January 7, 1962 - ('Custer Incident') Events alleged to have occurred resulting in trial board charges against Officer Young which were heard on April 13, 1962. According to charges of April 6, 1962, it was claimed that this officer, a married man (while off-duty, and separated from his wife) used "unnecessary violence" toward a person (one Helen C. Custer), struck her, threatened to kill her, and lived with her at an apartment and also that he had stayed with her at the Caravan Motel in Maryland at various times, and that he had failed to carry his service revolver (while off-duty), etc. (Plaintiff's Trial Exhibit 5 - "PX 5")

February 26, 1962 - Charge of assault on January 7, 1962 on Helen Custer nolle prossed in Court (PX 7).

February 27, 1962 - Dr. Shapiro examined Young (Tr. 36) -"very agitated and emotionally upset condition...someone had threatened to shoot him....his wife...mentioned a change in his personality four years previous (i.e. 1958)...Dr. Patten...mentioned change in personality...psychiatric records kept under lock and key at the police clinic...separate files...not put into folder....(Tr. 37).

March 5, 1962 - Found not guilty of assault on Custer (revived January 1962 incident) after trial in General Sessions Court.

April 13, 1962 (Trial Board Hearing - Custer Incident Charges) Officer Young testified (PX 5, 91-149) (Trial Board transcript 4/13/62) that he had been injured in the D.C. Transit accident (PX 5, 91) - head injured, was unconscious in 1957 accident - other accident in 1960 (PX 5, 96) it was stipulated that he had head injuries and was hospitalized (PX 5, 97) - 1960 accident referred to (PX 5, 98) - stated that Custer had hit him on head at her apartment (PX 5, 98, 99) - that had been married 12 years - 3 children - became separated from wife (PX 5, 99) reconciled with wife - stayed with wife at Caravan Motel (PX 5, 100) - never reprimanded while a policeman but had been commended (PX 5, 102). His then counsel at PX 5, pp 209-216, brought to the trial board's attention on final argument the facts of Officer Young's accidents, head injuries and

hospitalizations, etc. - denied that he had struck Custer or threatened to kill her - stated that, while separated from his wife he had dated Custer for a period of time - had told her that he was planning to reconcile with his wife, and that she was angry about this. Officer was found guilty of using unnecessary force toward a person, conduct unbecoming an officer, was found "Not guilty' of staying with Custer at the Caravan motel, and pleaded guilty to failure to carry his service revolver with him on January 7, 1962 at 7:26 a.m. (while off-duty). The recommendation of the trial board was that he be removed from the force (PX 9, Item 12).

May 16, 1962 - Police Trial Board hearing (see 90 page transcript in record) on revived charge that Officer Young stayed at the Caravan Motel on Route 301 in Maryland with Helen C. Custer (the complaining witness on the April 13, 1962 trial board charges), a married woman not his wife. (Officer Young had previously been charged with this offense and was found "Not guilty" in the April 13, 1962 trial board hearing). (PX 9, Item 11, p. 2) Young and his wife both testified that they had stayed at this motel together on a number of occasions. Young found 'Not guilty' of this charge.

It was brought out that Custer had been convicted of a "bad check" charge and ordered to make restitution or serve a sentence. (Transcript 5/16/62, p. 88)

June 11, 1962 - Commissioners reduced Trial Board's recommended sentence arising from "Custer Incident" of removal from the force to a $1500 fine and ordered officer be restored to duty on June 22, 1962. (PX 9, Item 13)

June 22, 1962 - Officer Young restored to duty.

July 10, 1962 ("Graff Incident")- In substance, on this date, Young, while at Wynn's Steak House ("Wynns") in Hyattsville, Maryland, with his wife for crabs, and while off duty and on leave, received a threatening phone call from a person cursing him and threatening "to beat him up" (PX 1, 141-142) - later one Graff walked into Wynns and grabbed Young by the neck - Young tried to avoid trouble with the man but couldn't get rid of him - Young didn't want any trouble, particularly because of previous trial board - Graff continued threats (PX 1, transcript of 9/19/62, 143, etc.) they went outside and then returned to the inside - Graff came back in and continued the cursing and threats (PX 1, 144) - there were some blows struck - but things calmed down - Officer Eldred A. Fox of the Prince George's County police arrived on the scene - when he arrived Graff, Young and a number of other persons were outside but nothing going on - (PX 1, 10-28) - Graff told Fox "I want this s.o.b. locked up. I will take his job from him" (PX 1, 14) he saw no sign of altercation or disarray either in the appearance of Graff or Young (PX 1, 13-14) -

Young identified himself as a D.C. Police Officer (PX 1, 15) - "He (Graff) said Officer Young was in trouble. And he was going to try to get his job...had been in trouble before. And he has gotten out of it. And he was not going to get out this time." (PX 1, 17) - that there were no marks on either of them, or signs of having been in a fight (PX 1, 21) - 'since they both knew each other, I thought probaoly they are friends' (PX 1, 21-22) - he told Graff if he wanted Young arrested, he should get a warrant (PX 1, 14) - Officer Fox left without placing charges against anyone - Later when questioned by a superior officer, Young at first denied conversing with the Prince George's officer, having learned that he might be in trouble for having failed to report the incident, but later Young voluntarily went to his superior officer and corrected his statement.

As a result of this incident, etc. Young was served with three trial board charges dated August 30, 1962 (JA 50A, B).

August 21, 1962 - Assault charges against Young based on the "Graff Incident" dismissed in Hyattsville Court (PX 1, 24-25).

September 19, 1962 - (Trial Board Hearing on "Graff Incident" Charges) - At a hearing (reported in PX 1), Young was found "Not Guilty' of Charge # 1 (i.e. assaulting Graff), was found 'Guilty' of Charge # 2 (i.e. 'an untruthful statement...pertaining to his official

duties as a Metropolitan Police Officer... on the basis of his original statement that he had not spoken to Officer Fox), was found 'Not Guilty' of Charge 3, Specification 1 (that he had gone to the Dixie Pig Restaurant seeking out a person who had called him on the phone, knowing that it would likely result in an altercation), and was found 'Guilty' of Charge 3, Specification 2 (i.e. "did fail to act properly as a police officer and clarify his participation by reporting the incidents to the police of the area and to proper authority in the Metropolitan Police Department..."). It was recommended that Officer Young be removed from the force (JA 51). (Defendant's "Answer")

September 27, 1962 - Young was referred to Dr. Shapiro by Police Clinic. Pertinent excerpts from Dr. Shapiro's testimony at trial pertaining to this visit and later consultations, etc, are: "He was referred to me through the clinic...his District physician.... the records show that...in 1961 or 1962 Dr. Harrell had recommended that he see me, and the man refused to see me, because he wanted to hold his job, and he thought he had been sick too long. (All emphasis supplied) (Tr. 37)....And the sick record and my reports, the copies, of his being sick and under treatment. (Tr. 38)....Dr. Williams, the neurosurgeon...recommended that he be referred to the staff psychiatrist. There is also a letter from Dr. Harrell indicating

that he should be referred to me for psychiatric care. This was long before--a year and some months before" (Tr. 38) (Transcript of Trial Court Hearing) (i.e. "long before..." September 27, 1962).... this man was very nervous and depressed....(Tr. 39) Well, this man was very nervous and depressed from the time in September 1962--it was September 27, 1962; (Seen by Dr. Shapiro) October 11, '62; October 25, '62; November 6, '62; November 20, '62; December 18, '62; January 3, '63; January 24, '63; February 14, '63; and the final one was March 7, 1963. The record of my findings and my treatment that I rendered on those dates, these were in the psychiatric folder at the clinic that is kept under lock and key unless a report is requested" (Tr. 39)....September 27, 1962...He was transferred to the Ninth Precinct on June 23, '62 which he stated was known as 'separation center'. (Tr. 40) And I asked him why he didn't come to see me at the time (Tr. 41)....He stated that Dr. Harrell had also referred him to me, but he didn't see me because 'I had so many injuries and was suffering from them that I was afraid I would lose my job.'....I asked him to go into detail regarding his present complaint, and he said he was nervous, all shook up, jumpy, gets headaches, dizziness, insomnia he's had insomnia for years (i.e. before 9/27/62) very irritable, jumpy. 'If someone

touches me, I jump.' And feels as if someone is 'going to hit me'. 'My friends tell me I have been jumpy for years and act like I'm mad most of the time....been very depressed...having frequent crying spells, often felt he didn't want to be around anybody. He says he keeps seeing false accusations made at him regarding the incident at Lynn's (Tr. 42)....He told me he felt he had reached the end of his rope and could no longer do duty at the Ninth Precinct. He feels the police officials have been on his back ever since he's been at Number 9. He added, 'I know this to be a fact'...man was definitely anxious and depressed....I had given him a prescription for fifty deprol...a drug used for depression (Tr. 43).

October 2, 1962 - Officer saw Dr. Shapiro - 'been on sick leave since September 20...under the care of Dr. Montgomery...still depressed...not bought deprol he didn't have the money." (Tr. 44)

October 11, 1962 - Dr. Shapiro "gruff...felt lousy" (Tr. 44).

October 18, 1962 - Dr. Shapiro - "No change. Still gruff. Acts depressed. Still taking Deprol' (Tr. 44).

October 25, 1962 - Saw Dr. Shapiro - 'No change in depression. Having headaches for long time...uses Empirin and Codeine, in part relieved. (Tr. 44)

November 6, 1962 - "feeling lousy . . . nervous . . . renewal of medication. . .given him (Tr. 45).

November 20, 1962 - Dr. Shapiro - "No change. . .feels he still has virus. . .terrible headaches. Still depressed.

December 6, 1962 - Dr. Shapiro - "No change. Still terrible headaches. Still depressed. . .No use giving me any more medication, I have no money for it. . .Fiorinal capsules. . .sample. . . to him. (Tr. 46)

December 18, 1962 - Dr. Shapiro examined Young. (Tr. 39)

January 3, 1963 - Young examined by Dr. Shapiro (Tr. 39).

January 24, 1963 - Young examined by Dr. Shapiro (Tr. 39).

February 14, 1963 - Young examined by Dr. Shapiro (Tr. 39).

March 7, 1963 - Young examined by Dr. Shapiro. Dr. Shapiro stated his opinion that Officer Young was disabled from performing his duties on this date and for some time prior thereto (Tr. 311). He explained the reason no recommendation had been made because it was against BPFS policy to act while Trial Board charges were pending. (Tr. 316)

April 23, 1963 - After Commissioners affirm Trial Board Officer Young removed from Metropolitan Police Force by order of Commissioners (PX 9, Items 3, 4). (JA 52)

May 31, 1963 - U.S. Civil Service Commission Appeals Examining Office, hearing on appeal from Commissioner's Decision of removal from force (PX 3).

August 30, 1963-C.S.C. affirms only "untrue statement".(JA 53A-F)

December 23, 1963 - U.S.C.S.C. notifies Young's then attorney of affirmance of Commissioner's ruling. (PX 6)

October 9, 1964 - Young notified of 12/23/63 C.S.C. ruling.(Tr.4)

October 7, 1965 - Complaint filed in U.S. District Court against Commissioners seeking that dismissal be set aside, and a hearing by Retirement Board on disability in performance of duty. (JA 0.03)

June 13, 1967 - Pre-trial hearing and proceedings (JA 0.08)

December 7, 1967 - Non-jury trial in District Court (See Tr. 1-46, and 301-326).

December 14, 1967 - Findings of Fact and Conclusions of Law (JA 0.11).

January 28, 1968 - First Notice of Appeal filed. (pro se)

August 19, 1968 - Commissioner's Motion to Dismiss appeal.

September 9, 1968 - Case remanded to District Court, re extension of time within to note appeal, and whether Young should be permitted to proceed in forma pauperis.

October 30, 1968 - District Court order extending time within which to note appeal.

November 1, 1968 - District Court order granting motion to appeal in forma pauperis.

November 14, 1968 - Second Notice of Appeal filed.

SUMMARY OF ARGUMENT

Officer Young served as a police officer for a period of years with efficiency and without derelictions, during which time he sustained many on-duty injuries (but no off-duty injuries) including head injuries, in making and maintaining arrests, etc.

In 1957 he was involved in an on-duty rear-end auto collision, and suffered a concussion and other injuries, which, added to his prior on-duty injuries, caused various symptoms, including headaches, dizziness, fainting spells, temporary loss of vision, etc., and a diagnosis (among others) of post-concussion syndrome, as a result of which he was attended by many police clinic physicians, and "outside" specialists, and was hospitalized and given many tests and X-rays, but without cure. As a result of the above injuries, and conditions, he was given excess sick leave and much "light duty". His many injuries, excess sick leave, etc. and need for psychiatric treatment which he tried to avoid caused him worry about losing his job, and depression.

In 1960, he was the victim of another on-duty rear-end collision when his stopped police vehicle was struck so severely that both seats were broken off, and there were superimposed upon the above conditions, additional severe injuries, requiring further extensive medical treatment, hospitalization, etc., and caused him growing irritability, insomnia, etc. He became separated from his wife and family.

As a result of the foregoing on-duty injuries, and their effect upon him, he became involved in several off-duty incidents, the second one of which resulted in trial board acquittal of the principal assault charge but a finding of "guilty" of making an "untrue statement. . .pertaining to his official duties as a Metropolitan Police Officer", despite the fact that the statement had nothing whatever to do with "duty". The police psychiatrist found him disabled for duty, but made no recommendation because of the BPFS policy of making no recommendation in this respect, especially in psychiatric cases, while trial board charges are pending, nor were any such recommendations ever made for reasons unknown, even <u>after</u> the trial board charge had been affirmed. Officer Young was then involuntarily removed (fired) from the force because of the guilty finding involving the "untrue statement. . . pertaining. . . police duties as a. . .police officer".

The trial board, et al. were in error in ordering his dismissal, etc. because Officer Young's on-duty injuries were responsible for his disability and pre-existed his alleged misconduct, of which he was erroneously found guilty. Further, he had no obligation or duty to 'apply" for disability retirement, because it must be <u>initiated</u> by the BPFS (not the officer). Under the cases, indicating the liberal policy of this Court in retirement cases, he should be retired for disability incurred in the performance of duty, or in the alternative, the case should be remanded to the Retirement Board for a hearing, and retirement for disability incurred in the performance of duty.

ARGUMENT

I. Officer Young showed definite medical symptoms of disability attributable to his many on-duty injuries in 1959 (and before), and he has been illegally denied disability retirement (or even consideration therefor) because of an adverse finding on one 1962 trial board charge (which is patently erroneous and otherwise insufficient) because under the doctrine of the case of Rudolph v. Mosheuvel, and others, his right to disability retirement became fixed at the time of origin of his said line-of-duty illness (from which he did not recover), which long ante-dated the events resulting in his trial board difficulties and undoubtedly caused them.

(With respect to Point I, appellant desires the Court to read the following pages from the Reporter's Transcript: Tr. 41, 42, 311)

As heretofore shown in the "Statement of the Case", Officer Young's condition, which was attributed to on-duty injuries (there were no off-duty injuries), manifested itself to the physicians at least as early as October, 1959 (if not before). Thus, see for example, Dr. Shapiro's testimony "....but he was a sick man at the time I saw him in 1959" (Tr. 311) and Dr. Shapiro's October 12, 1959 report which stated in part: (JA 37D)

> ". . . It is my opinion that Mr. Young is still suffering from the residuals of a cerebral concussion. He presents a rather typical picture of a post-traumatic head syndrome.. . . My

diagnosis in this case, is that of a post-traumatic head syndrome, with some super-imposed functional nervous symptoms. The latter, however, could still be part of his organic brain condition. Recommendations: This man, when seen by me on July 16, 1959, was still having symptoms of his original head injury of October 28, 1957. (i.e. the first on duty auto accident) He is still in need of treatment for this condition, in my opinion. He should be returned to the Police and Fire Clinic for further treatment of same.... (JA 37D).

There is no indication that Officer Young ever recovered from the condition which Dr. Shapiro mentioned above. In fact, the situation is quite to the contrary. He did not recover. He continued to have these difficulties and then there were, unfortunately, superimposed upon them the additional severe injuries incurred in the September 23, 1960 on-duty rear-end collision, when the police cruiser in which Officer Young was a passenger was struck from behind ,while stopped, so severely that both of the seats were broken off (JA 41), and which resulted in his hospitalization and diagnosis of "Severe neck strain and post concussion ha (headache) low back

strain, strain right knee and elbow due to w.l....' (JA 42 A-C).

After this accident examinations were made by other physicians including Dr. Jonathan M. Williams, who concluded in his report of January 13, 1961 '. . . I would think it appropriate therefore that your staff neuro-psychiatrist Dr. H. D. Shapiro examine this man and render an opinion.' (JA 46 A-B). For some reason this was not done at this time. This may have been because of Officer Young's devotion to duty and fear of losing his job and concern because of the many on-duty injuries (there is no evidence of any off-duty injuries), as shown by Dr. Shapiro's testimony at Tr. 41-42 as follows:

'A. . . . And I asked him why he didn't come to see me at the time. He stated that Dr. Harrell had also referred him to me, but he didn't see me because "I had so many injuries and was suffering from them that I was afraid I would lose my job."'

Also, in respect to Young's failure to recover see the testimony of Dr. Shapiro at Tr. 311, where the following appears:

'Q. Do you think in 1962, Doctor Shapiro, after you treated him in 1959 and throughout, that he was capable of performing his duties as a police officer?

A. Well, from the time I saw him officially in 1962, from September 27, 1962 through my last session

with him, March 7, 1963, I do not believe he was."

(Tr. 311).

This officer's rights became fixed at the time of the causes of his original disability and he cannot be denied his right to his retirement benefits as a result of later events; specifically the 1962 Trial Board charges.

Thus, in the case of Rudolph v. Mosheuvel, (1911), 37 U.S. App. D.C. 76, a fireman, who was seriously injured while on duty, but subsequently charges were filed against him, including a charge that if he had not been drinking at the time, the accident causing his disability would never have happened, and he was dismissed from the service. This court held that his right to retirement became fixed at the time he received his injuries, provided, as required by statute, provided, they permanently disabled him and were not brought on "by reason of his own indiscretion," (meaning the original injuries -- comparable here to the line of duty injuries and auto accidents,) and that, by a dismissal on charges of misconduct made thereafter, he could not be deprived of a pension which the commissioners had no power to suspend.

The commissioners have, in effect, previously urged that since Young was subject to charges before the Trial Board (which arose long after he became afflicted with his nervous disorder) he should

be denied consideration for disability retirement. This Court in the case of Spencer v. Bullock, 94 U.S. App. D.C. 388 (1954), 216 F.2d 54, held that the Commissioners would be prohibited from denying a police officer his right to voluntary retirement because of his suspension for failure to explain the source of some of his income. A somewhat similar argument was made by the Commissioners in the case of Carroll v. Tobriner, et al., in the District Court, 253 F. Supp. 87 (1966) where the Commissioners claimed that the officer's difficulties arose as a result of his tardiness on many occasions and his drinking while on duty and he was therefore not entitled to retirement in the line of duty. This argument was rejected by District Court Judge Oliver Gasch and the case was affirmed on appeal by this Court without opinion.

As some indication that Officer Young's disability may well have existed even prior to Dr. Shapiro's October 1959 examination see the following: ". . . his chief complaints were given as 'Dizziness and syncopal episodes of eleven months duration'" (quote from Providence Hospital Records for hospitalization from August 19-24, 1958, summarized at JA 37B, infra, p. 18); ". . . he has been the same now for the past year (as of November 1958). At the present time he complains of headaches and dizziness. He says

that his nerves are 'shot' . . . He can sleep only two or three hours a night and is nervous all the time.' (Dr. Carl Berg's Report of November 21, 1958, JA 26A, B, infra p. 21); "In my opinion Mr. Young has emotional problems of some severity" (Dr. Leslie E. Sanders, Police Department Psychiatrist's report as of December 12, 1958, JA 28A, B, infra, p. 23); "The neurological examination revealed an anxious tired man of about 29 years of age. . . .' (Dr. O. Hugh Fulcher's report dated January 13, 1959, JA 30, infra, p. 24); ". . . he had been very irritable toward his wife and children and occasionally to his colleagues at work. . . difficulty in falling asleep. . .there has been a growing irritability toward members of his family. . . . I informed Mr. Young. . . . that he had been suffering from an emotional depression. . . .' (Dr. Yochelson's report dated October 7, 1959, JA 36A - C, infra, p. 27).

In view of Officer Young's exemplary prior record with no derelictions to speak of, if any, his excellent efficiency reports, etc., and the fact that it was only after his many on-duty injuries including head injuries culminating in the September 23, 1957 on-duty traffic accident and injuries (JA 13), and multiple hospitalizations, that he began to suffer with severe headaches, dizziness, loss of vision, fainting spells, insomnia, "growing

irritability toward his wife and children, and his colleagues, all of which were aggravated by the superimposed severe injuries and effects, and further hospitalizations flowing from the September 23, 1960 on-duty auto accident (JA 41), to which there was added the worry and concern of losing his job because of his many injuries and his consequent reluctance to submit to further psychiatric help which was recommended by the physicians, his separation from his wife in 1961, it is only reasonable to believe that these many injuries and the multiple conditions and symptoms and effects resulting therefrom, were the CAUSE OF HIS DEPRESSION AND VARIOUS DIFFICULTIES in 1962, which lead to his removal from the force.

Thus, Officer Young has illegally been denied his right to disability retirement because of one 1962 trial board charge and finding which was patently erroneous, and otherwise insufficient cause for removal, as is elsewhere herein shown, in Point.

II. The Rulings and Findings of the Trial Board, Commissioners, Civil Service Commission, and District Court, are all clearly Erroneous, in Finding Officer Young Guilty of Charge No. 2, and its Specification, for '....making an Untruthful Statement PERTAINING to his OFFICIAL DUTIES as a Metropolitan Police Officer....' (the only guilty charge remaining against him) based upon the "Graff Incident" because the statement in question pertained to an off-duty while on leave incident, in a foreign jurisdiction (Maryland) where Officer Young had no authority to act as a Police Officer.

(With respect to Point II, appellant desires the Court to read the following from Plaintiff's Exhibit 1 in the Trial Court ("PX 1") transcript of proceedings before the Police Trial Board on September 19, 1962, pp. 10-28, 40, 57, 108, 109, 111, 122, 132, 142, 144, 154, 170; from PX 3 report of the appeal to the Civil Service Commission August 30, 1963 (JA 53A-F), pp. 5, 6; from PX 3, the portion containing the transcript of the hearing before the Civil Service Commission on May 31, 1963, pp. 24, 33; and from PX 9, Item 15, transcript of appeal to the Commissioners on April 11, 1963, pp. 14, 15, 16)

The pertinent facts in this respect are (see in general PX 1, Trial Board Transcript for 9/19/62) that in the early morning of July 10, 1962 Young was at 'Wynn's Steak House' in Hyattsville, Maryland, with his wife for hard shell crabs. Young received a phone call from a caller who cursed him and threatened to 'beat the hell' out of him and previously had received other such phone calls (PX 1, p. 142). While sitting at the bar Young was goaded and grabbed by one John F. Graff, Jr., and after further annoyance, etc., Young hit

Graff only to get rid of him and retreated (PX 1, p. 143, 165). Later Graff grabbed Young again, etc. (PX 1, 144) Graff had previously told one Firmin that Young was a 'phony' and that he was going to "hit him" (PX 1, pp. 108, 109, 111). Graff was also quoted as saying "give me a beer <u>this is my night to raise hell</u>' (PX 1, p. 122) and (to Young) "<u>Just because you are a god damn cop and carrying a gun, you think you are tough</u>" (PX 1, 122) and 'You son of a bitch, whom do you think you are dealing with, a god damned kid?" and after that he started toward Mr. Young (PX 1, p. 122). Young showed him that he had no gun as he was off duty in Maryland (PX 1, p. 144). Graff had been at "Lynn's" earlier (and seen Young there) left and came back (PX 1, p. 44). Graff knew of Young's previous trouble having read about it in the newspapers (PX 1, p. 57). The incident was described as a 'scuffle' or "No strikes at all just a tussle as they were going out the door' (Cable's testimony, PX 1, p. 132). Graff called the police (PX 1, p. 40).

As a result a Prince George's County Police officer named Eldred A. Fox came to the scen . (PX 1, p. 10-27) At this time Young identified himself as a D.C. Police Officer. Young was not looking for any trouble (because of previous trouble) (PX 1, p. 15). Officer Fox could see no indications of a struggle or injury to either man and things were peaceful. Fox advised Graff that if he wanted

Young arrested he should obtain a warrant, and then Fox left the scene (PX 1, 10-27). Graff did obtain a warrant for Young's arrest for assault, which was served upon Young at about 11 a.m. on July 10, 1962, at which time Young learned from the officer serving the warrant that Officer Fox was in potential difficulty as a result of the incident (PX 1, 170). When questioned by a superior officer Young at first denied having had any conversation with Officer Fox, (PX 1, p. 154) (for the reason of maintaining good relations between the D.C. and the P.G. County police, and to protect Fox). Later Young voluntarily corrected his statement indicating that he had had a conversation with Fox. The assault charge (upon Graff) brought against Young was dismissed in the Hyattsville court (PX 1, p. 24, 25, 63).

At the trial board hearing on September 19, 1962, Charge No. 1, and both of its specifications based on the alleged assault by Young were dismissed and Young found "Not Guilty". Young was, however, found guilty of Charge No. 2 and its specification (and Charge No. 3, Specification 2) for having made an untruthful statement pertaining to his official duties as a Metropolitan Police Officer, allegedly in violation of Chapter XXXV, Section 22(f) of the Manual of the Metropolitan Police Department (JA 51-52).

It is submitted that this statement did not "pertain to his official duties as a Metropolitan Police Officer", but, on the contrary, pertained to an off duty - on leave incident which had absolutely nothing to do with Young's "official duties as a Metropolitan Police Officer", and that therefore the finding of guilty on this charge is clearly erroneous.

The foregoing charge, namely the "untruthful statement... pertaining to his official duties. . .' is the only 'guilty' charge remaining against Officer Young arising from the "Graff Incident" in that the Trial Board's guilty finding on Charge No. 3, Specification 2, namely his failure 'to act properly as a police officer and clarify his participation by reporting the incident to the Police of the area and a proper authority in the Metropolitan Police Department thereby prejudicing the reputation of the Police force" (JA 50A) because in the report of the appeal to the Civil Service Commission dated August 30, 1963 ((JA 53 F) it was stated: "Since specification 2 of Charge 3 fails to support the charge no further consideration will be given to Charge 3, and specification 2 in the adjudication of Mr. Young's appeal", and later (JA 53F) appears the statement "In summary we find that Charge 2 and its specification and the prior record cited in the advance notice are sustained." (Significantly omitting any statement as to sustaining Charge No. 3, Specification 2).

Officer Young testified at the C.S.C. hearing on May 31, 1963, p. 24 as follows: (PX 3)

"However, when I was arrested on the warrant for the assault, the alleged assault, I went to the Prince George's Police Headquarters directly from my residence. At that time there was a Police Lieutenant on the scene at the Prince George's Police Headquarters. I immediately reported my participation in the alleged assault at the time that I arrived at the Prince George's Police Headquarters after having been served warrant...At the time the incident occurred, I was on annual leave, I was in Prince Georges County, which is in the State of Maryland. I lacked authority and jurisdiction in Prince Georges County or in the State of Maryland. At no time could I perform my official duties as a Metropolitan Policeman in the State of Maryland or in Prince Georges County (PX 3, p. 24) (and at p. 33 Officer Young testified): Q. ... Had you believed that it pertained to your official duties would you have told the truth then? A. I would have told the truth then, and I went in and told the Captain the truth. . . . (PX 3, 33).

As evidence of the substance of this contention see PX 9, Item 15, see the hearing on Officer Young's appeal from the Trial Board findings and recommendation before the Commissioners on April 11, 1963 where Commissioner Tobriner, a lawyer of considerable experience, raised the question with the Corporation Counsel indicating his belief that the statement made by Officer Young was not "pertaining to his official duties", as reflected by his questions and comments as follows: (PX 9, Item 15)

> (at p. 14, Line 11) "Commissioner Tobriner (to the Corporation Counsel). . . . .What do you say to this apparent technical difficulty as a statement of the written report pertaining to his official duties of the Metropolitan Police?" (at p. 15, Line 21) "The language of the Rule as I get it, the verbal or written report must pertain to his official duties, must involve a statement of something that happened independently of the report pertaining to his official duties" (at p. 16, Line 8) The language of the Rule it must pertain--a verbal or written report pertaining to his official duties--- some duty independent of his duty to make a report. Mr. Robbins: I don't think so...." (Emphasis supplied)

It is submitted that Commissioner Tobriner's interpretation is the only logical and the correct interpretation of Police Manual Chapter XXXV, Section 22(f), which is quoted at JA 53D, and that Young has been erroneously found guilty of this charge.

For the foregoing reasons, this Court is urged to reverse this sole remaining "guilty" finding against Officer Young.

III. <u>The Trial Court Misconceived the Method Followed in initiation of Disability Retirement Proceedings, Made Errors in the 'Findings of Fact. . .' and Commissioners' BPFS erroneously failed to Conduct A Medical Survey of Officer Young When Dr. Shapiro Found him to be disabled for Duty.</u>

(With respect to Point III, appellant desires the Court to read PX 5, April 13, 1963 Trial Board Hearing, p. 95-97, 208-216; Tr. 311, 316; PX 1, September 19, 1962 Trial Board Hearing, p. 175)

The Trial Judge made frequent inquiries, etc. during the trial as to whether Officer Young had applied for or raised the question of disability retirement. While application can be made by an officer for '<u>Optional Retirement</u>" under D.C. Code 4-528, retirement for disability is traditionally and always in the District of Columbia as far as is known to counsel, <u>initiated by the BPFS</u>. Thus the Trial Court's "Findings. . . 7, 9, 10, and 11" (JA 0.11) all deal

with Officer Young's failure at the trial board hearings, appeal to the Commissioners, etc., to apply for or raise the question of his entitlement to disability retirement, etc. It is contended that disability is a medical question, and that it was the duty of the BPFS to make such a finding.

Nevertheless, with regard to Finding # 9, to the effect that Young had not applied for medical retirement, etc., Officer Young did testify at the April 13, 1962 Trial Board hearing as to some of his on-duty injuries, including the D.C. Transit accident (PX 5, p. 95), head injury and unconsciousness the 1960 accident (PX 5, p. 96), that he sustained head injuries and there was a stipulation that Officer Young had been hospitalized, and an argument resulted as to the relevancy of this testimony (PX 5, p. 97). In addition Young's then attorney in summation argued that Young had been injured on duty (PX 5, p. 203-216). That it is the PBFS which makes the finding of "disability" is shown by D.C. Code 4-521 "Definitions", (2) which reads in pertinent part:

> "The terms 'disabled" and 'disability" mean disabled for useful and efficient service in the grade or class of position last occupied by the member by reason of disease or injury, not due to vicious habits or intemprance as determined by the Board of Police and Fire Surgeons. . . ."

In addition, the Manual of the Metropolitan Police Department, Chapter XXXIV, Board of Surgeons, Sec. 7 states:

> "Whenever, in the judgment of the board of surgeons, any member of the force has reached a pensionable status, it shall be the duty of the board to submit report to the major and superintendent recommending that such member be ordered before the retiring board."

The Trial Judge also inquired as to whether Dr. Shapiro had ever suggested to Officer Young that he apply for service connected disability retirement (at Tr. 316), and made a finding, # 8, that no "doctor . . . recommended him for disability retirement.", Dr. Shapiro (who had previously stated his opinion that Young was disabled for duty at Tr. 311), explained why there had been no such recommendation in this case, saying: (at Tr. 316 bottom):

> ". . . .it has been the policy of the Board of Police and Fire Surgeons, especially in a psychiatric case, that if a man is facing charges before a trial board, no action is taken towards recommending retirement until these charges are disposed of. . . ."

Under these circumstances, the question naturally arises, as to why the PBFS never took any action after the trial board charges had

been affirmed, and before Young's removal. As elsewhere herein raised, there is also some question as to the wisdom of the said BPFS policy.

Contrary to the Trial Court's 'Finding 12", "that there is nothing in the record which should have caused the Police Trial Board to raise sua sponte the question of disability and retirement on the part of the plaintiff", it is submitted that the myriad accident reports, medical reports, sick leave records summarized in the "Statement of the Case" herein, which were contained in Officer Young's personnel files, etc., all of which were available to the Trial Board, and all of which were admitted in evidence (see PX 1, p. 175, which shows that Young's 'personnel file" was before the September 19, 1962 Trial Board) in the Trial Court (as Plaintiff's Exhibits 1 through 9), contain weighty evidence of Young's severe injuries and disability.

Finally, in regard to the Trial Court's Findings 13 and 14, that the Trial Board's recommendation of Young's removal as being supported by substantial evidence, and the Commissioner's approval of same, which at this stage is speaking only of the finding on the "untruthful statement. . .pertaining to official duties" see Point II above.

It is urged therefore that the Trial Court misconceived the method and usual procedure followed in disability retirements, and made erroneous Findings of Fact on Findings 7 through 12, and consequently the Court's "Conclusions of Law" are likewise erroneous, and should be overruled.

IV. Under the Liberal Attitude of this Court in Retirement Cases Generally, and Particularly the case of Blohm v. Tobriner, the Commissioners had at the very least, the Duty of Establishing Whether Officer Young's Disability (which is established by the Record herein) Resulted from Performance of Duty or Aggravation by Duty, And This Court should, On the Basis of the Present Record, Order Officer Young retired for disability incurred in the performance of duty, or remand the Case for Further Proceedings in this Respect.

(With respect to Point IV, appellant desires the Court to read from the Transcript of the District Court trial, pp. 13-17, 31-46, 303-311, 314-316)

While the prior proceedings in this case involved an involuntary removal, as distinguished from a retirement, under the circumstances here existing, at the very least, a Retirement Board hearing should have been held to determine whether Officer Young's disability (which Dr. Shapiro found to exist) was service connected, entitling him to retirement under D.C. Code 4-527 (Retirement for disability while performing or not performing duty), or under D.C. Code 4-526 (Retirement for disability not incurred in the performance of duty). It is submitted, /

that on the extensive record, set forth in the 'Statement of the Case' herein, it is clear that his disability does exist, and that there is little, if any, basis for finding that it is anything but service connected.

In this respect the liberal attitude of this Court in cases involving retirement as reflected by many cases should be considered. In particular see the important case of Blohm v. Tobriner, 122 App. D.C. 2 (1965) rehearing denied (re-inforced by Wingo v. Washington, 129 App. D.C. 410, 395 F.2d 633 (1968)), which reads in part:

> 'Where it is the police department which initiates the proceeding to retire an officer against his will for the disability which is alleged to be unrelated to his official service, the evidence of such lack of connection should clearly preponderate and be substantial and persuasive. Absent a record of which this can be said the Department may be said to have failed to carry the burden, fairly to be assigned to it under the statute.' (Emphasis supplied).

In Footnote No. 2, the Court stated, in part:

> "The Department had the burden of showing affirmatively that appellant's headaches were not the result of his earlier accident. When its own evidence, in substance,

merely demonstrates the difficulty of establishing the contrary, we cannot say that the burden has been met."

Further, this Court stated (122 App. D.C. at 3) as follows with regard to "resolving doubts":

"As appellant's history shows, policemen must of necessity engage in hazardous work as part of their regular duties and Congress has amply manifested a distaste for the resolution of doubts against them in the administration of the laws passed for their protection. See Hyde v. Tobriner, supra, Note 1." (And citing other cases) (Emphasis supplied).

The usual presumption in favor of sustaining findings of administrative bodies is not to be indulged in a case where a District of Columbia policeman is retired for disability not incurred in line of duty. Monica v. Tobriner, D.C., 253 F. Supp. 851 (1966).

The Blohm case, while not actually so holding, in effect, results in a presumption arising similar to that provided for in the Workmen's Compensation Act, 33 U.S.C. 920, which states in part:

"In any proceeding for the enforcement of a claim for compensation under this Chapter it shall be presumed in the absence of substantial evidence to the contrary--

(a) That the claim comes within the provisions of this Chapter. . ." 3/

The liberality of this Court toward retirement cases is further demonstrated in the case of Hyde v. Tobriner, 117 App. D.C. 312 (1964) where it is stated in part as follows:

"The ambiguity in this statement (referring to the doctor's statement that the officer's arthritis was either caused by or aggravated by his duties) is resolved favorably to the appellant because the Board of which this doctor was a member had previously certified that appellant's injury or disease, arthritis, was incurred in the performance of duty, adding that police officers are generally susceptible to this illness due to the nature of dampness, cold and strenuous nature of their duties. In evaluating the evidence consideration was given to the humane purpose of such retirement laws. Accordingly, the evidence must be viewed in a light more favorable to the applicant seeking relief than in the usual type of civil action. See Crawford v. McLaughlin. . ."

3/ See Florida statute providing that certain disabling diseases of policemen shall be presumed to have been suffered in the line of duty unless the contrary be shown. Coral Gables v. Brasher(Fla), 120 So2d 5.

The facts should be considered in the light of the foregoing legal principles. Thus Dr. Shapiro testified (at Tr. 311) "I do not believe he was." (capable of performing his duties as a police officer). At Tr. 316 Dr. Shapiro explained quite significantly in response to questions by the Court as to whether he had ever suggested Young apply for disability retirement, etc.

> "As to the question of applying for retirement, it has been the policy of the Board of Police and Fire Surgeons, especially in a psychiatric case, that if a man is facing charges before a trial board, no action is taken towards recommending retirement until these charges are disposed of. . . ." (Tr. 316).

A question may well be asked as to the validity of this "policy". A further question which remains unanswered in this case, particularly in view of Dr. Shapiro's opinion (at Tr. 316) that he did not believe that Young was capable of performing his duties as a police officer (i.e. disabled for duty), is why there was no medical survey on Young after the Trial Board charges had been affirmed by the Commissioners, and before Young's removal. Of course, Dr. Shapiro was the psychiatrist member of the BPFS from July, 1960 - October, 1965, as he testified at Tr. 31, and his opinion, particularly in his specialty, should be imputed to the BPFS and to the Commissioners.

D.C. Code 4-529, 1967 Ed., provides in part "that if a member is injured or contracts a disease during his first five years of service in his department which, in the judgment of the Board of Police and Fire Surgeons, disables him from performing further duty in his department', and the Retirement Board finds that it was not incurred in the performance of duty, the member shall be separated from the service. This section necessitates a medical survey and determination of the member's condition who has served less than five years prior to his removal.

While the above section does not, as such, apply to the instant case (because Young's service was deemed to commence in 1950) the general principle is applicable, and Young should have been given a pre-removal medical survey in any event. It is further submitted that since Dr. Shapiro, the BPFS psychiatrist, having found Young disabled, it was incumbent upon the Commissioners, in the interests of justice, and particularly under the doctrine of the case of Rudolph v. Mosheuvel, to provide for a determination by the BPFS and/or the Retirement Board of the question as to whether Young's disability predated his alleged misconduct which resulted in the adverse trial board finding.

In this respect, among others, the Commissioners, through their agents, the BPFS and/or the Retirement Board, have failed in their duty. This Court is therefore urged to either order that Officer Young be retired for disability incurred in the performance of duty, on the basis of the extensive record set forth in the "Statement of the Case", or in the alternative, at least, remand the case for further proceedings in this respect. See in this respect Wingo v. Washington, supra.

CONCLUSION

It is submitted that appellant's injury on-duty and medical record was such that the Board of Surgeons should have conducted a medical survey and recommended consideration of his disability retirement to the Retirement Board even before his 1962 trial board hearings, (which erroneously found him guilty of an "untrue Statement. . . pertaining to official duties. . ."), or at the very least and in view of the police Psychiatrist's finding of disability for duty, have done so after said trial board hearings, and that on the basis of the aforementioned authorities including the Blohm case which places a substantial burden on the Commissioners, and the decree against resulting "doubts" against policemen in retirement

cases, and the liberal attitude of this Court toward retirement cases generally as shown by the Hyde case which requires that "evidence must be viewed in a light more favorable to the applicants seeking relief than in the usual type of civil action", and upon the "humane purpose of the reitrement laws" as referred to in the Crawford case, this case should be reversed and remanded to the Commissioner with instructions either to retire appellant for disability incurred in the performance of, or aggravated by, duty or in the alternative for a hearing before the retirement board to consider this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That a copy of the foregoing Brief had been mailed to Attorney for Appellee, David Sutton, Esquire, Assistant Corporation Counsel, District Building, Washington, D.C. 20004, this ____ day of June, 1969.

/s/ CARLETON U. EDWARDS, II
CARLETON U. EDWARDS, II

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,727

ALTON D. YOUNG,

Appellant,

v.

WALTER E. WASHINGTON, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

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CASES CITED

DISTRICT OF COLUMBIA CODE, 1967, CITED

OTHER AUTHORITY CITED

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* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 21,727

ALTON D. YOUNG,

Appellant,

v.

WALTER E. WASHINGTON, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES

ISSUES PRESENTED FOR REVIEW

1. Whether the evidence contained in the administrative record compelled the Commissioners of the District of Columbia to consider appellant, a former police officer, for disability retirement instead of removing him for cause.

2. Whether there is in the administrative record a rational basis for the order of the Commissioners removing appellant for such cause as will promote the efficiency of the service.

This case was previously before the Court under the same title and number and, on September 9, 1968, was remanded to the court below for determinations as to whether the failure to file a timely notice of appeal was due to excusable neglect and as to whether permission should be granted to proceed in forma pauperis.

REFERENCES TO RULINGS

On December 14, 1967, the court below entered findings of fact, conclusions of law, and an order upholding appellant's removal for cause from the Metropolitan Police Department. The court's rulings are reproduced in the folder filed by appellant at 011-013.

The administrative rulings consist of an order entered by a police trial board September 19, 1962, sustaining charges of misconduct placed against appellant and recommending his removal from the Department; an order of the District of Columbia Commissioners entered April 15, 1963, removing him from the Department effective April 25, 1963; a letter transmitted to appellant on April 23, 1963, notifying him of the findings of the District of Columbia Commissioners and their decision to remove him; a decision of the United States Civil Service Commission's Appeals Examining Office rendered August 30, 1963, sustaining the removal action of the District of Columbia Commissioners; and a decision of the Civil Service Commission's Board of Appeals and Review entered December 23, 1963, upholding the ruling of the Appeals Examining Office. The findings and recommendation of the police trial board, the charges and specifications incorporated therein by reference, the District of Columbia Commissioners' order effectuating the removal, and the decision of the United States Civil

Service Commission's Appeals Examining Office are contained in the folder filed by appellant at pages 50A through 53A. The letter notifying appellant of the District of Columbia Commissioners' decision to remove him and the decision of the United States Civil Service Commission's Board of Appeals and Review are not contained in the folder filed by appellant, but are part of the record on appeal. The former document is item 3 contained in plaintiff's exhibit 9 filed in the court below and the latter document (unnumbered) appears in both plaintiff's exhibits 6 and 7 filed in the court below.

COUNTER-STATEMENT OF THE CASE[1]

This is an appeal from a judgment of the court below upholding the discharge of appellant from the Metropolitan Police Department. The discharge followed disciplinary proceedings which concerned appellant's involvement, while a police officer, in certain altercations at

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[1] The voluminous record on appeal, consisting as it does of numerous transcripts, files, and exhibits is unpaginated. Counsel for appellant has reproduced only selected portions of the pertinent data of record in the folder filed with this Court, which he labels a "joint appendix." For the sake of clarity, appellees' brief will refer to unreproduced material by citing the number of the exhibit in which a particular document is contained, and, wherever possible, subnumbers or letters of documents or item numbers will also be cited. References to the transcript of the proceedings in the court below will be prefixed by the abbreviation "Tr."

a Hyattsville, Maryland, restaurant and conduct which followed such altercations. On September 19, 1962, the Metropolitan Police Trial Board found that appellant (hereinafter the officer) willfully and knowingly and in writing made an untruthful statement to his superior officer by denying that, following the altercations, he had conversed with a member of the Prince Georges County Police Force. The Trial Board also found that the officer engaged in conduct prejudicial to the reputation and good order of the police force, in that he failed to clarify his participation in the altercations by reporting the incidents to either the Prince Georges County Police Department or to the Metropolitan Police Department and recommended his discharge (pltf's. ex. 9, items 5 and 6). The District of Columbia Commissioners approved the Police Trial Board's removal recommendation, additionally taking into consideration other disciplinary proceedings involving the officer several months previously (pltf's. ex. 9, items 1 and 3). Although the United States Civil Service Commission ruled that the charge of engaging in conduct prejudicial to the reputation and good order of the police force had not been sustained, it upheld the finding of the District of Columbia Commissioners as to the untruthful statement charge and concluded that this finding, together with the officer's prior misconduct, justified the removal action (folder 53A-53F; pltf's. ex. 3).

In his action below, the officer did not challenge the sufficiency of the evidence to support his removal for cause, but claimed that he should have been retired for disability, rather than discharged, asserting that the pertinent medical data established that he sustained numerous injuries in the line of duty (folder 0.03, 0.04). In the proceedings which followed, the District of Columbia Commissioners contended, and the court found, that the officer made no request for disability retirement either before or after his removal, that no physician had ever recommended that he be retired for disability, and that there was no evidence in the administrative record "* * * which should have caused the police trial board to raise, sua sponte, the question of disability and retirement * * *" (folder 0.11-0.13).

The officer was appointed to the Metropolitan Police Department on November 10, 1952 (folder 3A). On October 28, 1957, a police vehicle operated by the officer was struck in the rear by a D. C. Transit bus. The officer sustained a concussion and was treated at Emergency Hospital (folder 13). Following his release from the hospital, he complained of headaches and dizzy spells and was seen by several physicians. One such physician, Dr. Sanders, a Police Department psychiatrist, saw him several times during the early months of 1959 (folder 28A). The officer filed a claim against the D. C. Transit

Company and was referred by his attorney to Dr. Hyman D. Shapiro, another psychiatrist, with whom he consulted on July 16, 1959 (Tr. 32, 306; folder 34A-34D, 37A-37D). Although Dr. Shapiro later was appointed to the Board of Police and Fire Surgeons, he then consulted with the officer as a private physician. Dr. Shapiro's diagnosis was "* * * post-traumatic head syndrome, and with some superimposed functional nervous symptoms * * *." The claim against the D. C. Transit Company was subsequently settled (Tr. 34, 306; folder 37D).

On September 23, 1960, while assigned to a police vehicle, the officer was involved in a collision with another automobile and was hospitalized and treated for strained muscles of the neck, concussion, and lumbar sacral strain (folder 41). Thereafter, he complained of headaches and was referred to Dr. Jonathan Williams for a neurosurgical consultation (folder 42A, 42B, 46A, 46B). Although Dr. Williams could "find no evidence of neurologic disability or impairment," he stated that:

> "As I look upon this policeman, reviewing his past history and regarding his general attitude to my examination, which, I repeat, was not hostile, I cannot help but feel that there may exist above and beyond the accustomed involuntary and unknowing 'posttraumatic syndrome' there exists a wilfulness and strong desire on the part of the patient to magnify his symtoms

> and disabilities. I would think it appropriate therefore that your staff neuro-psychiatrist, Dr. H. D. Shapiro, examine this man and render an opinion." (Folder 46B.)

The officer resumed police duty following the accident of September 23, 1960, but made no visits to Dr. Shapiro until February 27, 1962. On this occasion, he approached Dr. Shapiro (then the Police Department psychiatrist) in a depressed, agitated, and emotionally upset condition, stating that an assault charge had been placed against him on January 7, 1962. (Tr. 36, 308, 314.) The physician told the officer that he could not treat him unless he was "officially" referred for treatment through the Police and Fire Clinic (Tr. 36, 310), but no such referral was then requested or made.

The assault charge of which the officer complained to Dr. Shapiro stemmed from an incident which later gave rise to trial board proceedings. On April 6, 1962, the Department alleged and, on April 13, 1962, a Police Trial Board found, that on January 7, 1962, the officer (1) willfully mistreated and used unnecessary violence towards, and threatened to kill, a certain woman, not his wife, with whom he was living, and (2) that he failed to carry his service revolver while off duty (pltf's. ex. 9, items 11 and 12). The Police Trial Board recommended the officer's removal, but the District of Columbia Commissioners, on June 11, 1962, imposed a fine of $1500 in lieu of

removal, and the officer was restored to duty on June 24, 1962, and at once transferred to the Ninth Precinct (pltf's. ex. 9, item 13; letter from Deputy Chief Howard V. Covell to Commanding Officer, Fifth Precinct, dated June 20, 1962, and contained in pltf's ex. 7).

On July 10, 1962, the officer engaged in the activities which gave rise to the trial board proceedings of September 19, 1962, and his ultimate removal from the Department. On September 27, 1962, approximately one week after the trial board's findings and recommendation of removal, he again approached Dr. Shapiro. The officer told the physician that he was "nervous and shook up" following his involvement in trial board proceedings and his transfer to the Ninth Precinct (Tr. 41, 312-314). In the meantime, he had appealed the removal recommendation of the trial board to the District of Columbia Commissioners (pltf's. ex. 9, items 7, 8, 9), and, in a letter dated October 3, 1962, the Commissioners notified the officer:

> "You are advised that the Board of Commissioners of the District of Columbia is considering the recommendation of the Metropolitan Police Trial Board that you be removed from the service of the Metropolitan Police Department. This recommendation is the result of a hearing held by the Police Trial Board on September 19, 1962, on certain charges and specifications which were served upon you on September 1, 1962. The aforesaid charges and specifications are incorporated herein by reference.

> "In arriving at a final decision, the following will also be taken into consideration: You were fined $1500 on June 11, 1962, as a result of a hearing held by the Metropolitan Police Trial Board on April 13, 1962, on certain charges and specifications which were served upon you on April 9, 1962. These charges and specifications and the final decision of the Board of Commissioners (Commissioners' Order No. 62-1052, June 11, 1962) are incorporated herein by reference." (Pltf's. ex. 9, item 1.)

The officer consulted with Dr. Shapiro on several occasions from September 27, 1962, through March 7, 1963 (Tr. 37-39). In the course of these consultations, the officer told the physician that he was anxious and disturbed regarding the outcome of his appeal to the District of Columbia Commissioners and its effect on his future as a policeman (Tr. 44, 45, 303, 312).

In a letter dated February 18, 1963, to Dr. Shapiro, the officer's then attorney, Steven Ostatnik, requested that the physician provide him with "complete medical reports." In his letter of response dated March 8, 1963, Dr. Shapiro suggested a meeting for the purpose of reviewing pertinent medical data (pltf's ex. 4B, item 16). But at the appeal proceedings before the District of Columbia Commissioners on April 11, 1963, the officer made no claim of disability and his attorney urged the Commissioners "to allow * * * Mr. Young * * * to

remain a policeman" (transcript of proceedings before Commissioners, pltf's. ex. 9, item 15 at 14).

By order entered April 15, 1963, and effective April 25, 1963, the Commissioners upheld the findings and recommendation of the Police Trial Board, and the officer was notified of the decision to remove him on April 23, 1963, in a letter, also stating that:

> "The Commissioners carefully considered the charges and specifications on which you were tried before the Police Trial Board on September 19, 1962, the findings and recommendation of said Trial Board, and all other matters mentioned in my letters of October 3, 1962, and January 16, 1963, as well as the arguments and all matters presented at the oral hearing before the Commissioners on April 11, 1963, and all matters submitted to the Commissioners in writing by you and your attorney." (Pltf's. ex. 9, item 3.)

The officer appealed the removal action to the United States Civil Service Commission and was subsequently given a hearing before the Commission's Appeals Examining Office, which upheld the action of the District of Columbia Commissioners. In its opinion rendered on August 30, 1963, the Appeals Examining Office noted that the removal action was based on the charges preferred at the trial board proceedings of September 19, 1962, together with the prior misconduct which gave rise to the fine of $1500 on June 11, 1962 (folder 53C,

53D). The Appeals Examining Office then ruled that, although specification 3 of the more recent charges, relating to conduct prejudicial to the reputation and good order of the police force, "fails to support the charge" (folder 53E), the District of Columbia Commissioners' finding respecting the officer's untruthful statement together with his prior misconduct justified his removal from the Metropolitan Police Department (folder 53F). The officer appealed this ruling to the Civil Service Commission's Board of Appeals and Review, which on December 23, 1963, held that "on the strength of the sustained charge and the prior record, Mr. Young's removal was warranted * * * [and] was effected for such cause as to promote the efficiency of the service * * *." (This ruling, an unnumbered document, is contained in pltf's. exs. 6 and 7.)

At the proceedings before the Civil Service Commission, the officer made no claim that he should have been considered for disability retirement instead of discharged for cause, and he proffered no representations to this effect in a four-page letter to the District of Columbia Commissioners on January 2, 1964, in which he asserted that the Commissioners' previous findings were unreasonable and requested further review (see pltf's. ex. 6).

On October 7, 1965, when the instant action was instituted, the officer asserted, for the first time, that he should have been retired for disability rather than discharged (folder 0.03, 0.04).

At the proceedings below, Dr. Shapiro testified in the officer's behalf respecting the psychiatric consultations following the collision with the D. C. Transit bus in 1957, and the more recent consultations following the placement of misconduct charges against the officer in 1962. The physician stated that, when he first saw the officer "officially," from September 27, 1962, through March 7, 1963, he was not capable of performing police duty due to a depression (Tr. 311, 312). The physician described his condition at this time as follows:

> "Well, as I say, he had this acute situation, he was facing Trial Board, his life was being threatened, he was in very bad shape at the time. But again, that was connected with situational factors." (Tr. 311.)

And when requested on cross-examination to state his opinion as to the cause of the depression, the physician testified:

> A [His] depression was associated with these difficulties he claimed he had been having from the fact that he had been transferred to a precinct which was a separation center, and that he thought the police were on his back, and he was also depressed about the pending charges.

Q Were you familiar with the fact that on September 19th, 1962 he was before the trial board of the Metropolitan Police Department?

A Yes. I had brought that out.

Q Was this a significant factor in his depression?

A I said it was part of it, that he was facing these problems, but he dated his depression back, as I said, to September 19, 1962. Let's see. And then when he was transferred to -- no, to June 23, 1962, he says when he was transferred to No. 9, because he felt that was a move to get rid of him. He called No. 9 the separation center. [Tr. 312-313.]

* * * * *

Q In February [1962] you saw him as a private case; is that correct?

A Well, he came to me as a private case, and I refused to take it as a private case because I was then officially with the Police Department.

Q But you testified as to some diagnosis of him in February, 1962.

A Well, I said he was agitated and depressed at the time.

Q Would that be depressed because of the trouble he had gotten into earlier in 1962 for which he was going to be trial boarded in April, 1962?

A Well, at that time his complaint was that he had been on the force 12 years and recently he was charged with simple assault on January 7, 1962.

Q Would that be the cause of his depression?

A Yes, that could be. [Tr. 313-314.]

At the conclusion of the proceedings, the court entered its findings of fact, conclusions of law, and judgment in favor of the District of Columbia Commissioners (folder 0.13), and this appeal followed.

STATUTES INVOLVED

District of Columbia Code, 1967.

METROPOLITAN POLICE

"§ 4-121. Rules and regulations -- Fine, suspension, or dismissal of police -- Charges to be heard by trial board.

"Said commissioners, in addition to the powers vested in them by law, are also hereby authorized and empowered to make, modify, and enforce, under such penalties as they may

deem necessary, all needful rules and regulations for the proper government, conduct, discipline, and good name of said Metropolitan Police force; and said commissioners are hereby authorized and empowered to fine, suspend with or without pay, and dismiss any officer or member of said police force for any offense against the laws of the United States or the laws and ordinances or regulations of the District of Columbia, whether before or after conviction thereof in any court or courts, and for misconduct in office, or for any breaches or violation of the rules and regulations made by said commissioners for the government, conduct discipline, and good name of said police force: Provided, That no person shall be removed from said police force except upon written charges preferred against him in the name of the major and superintendent of said police force to the trial board or boards hereinafter provided for and after an opportunity shall have been afforded him of being heard in his defense; but no person so removed shall be reappointed to any office in said police force * * *."

"§ 4-122. Trial board -- Appointment -- Hearings -- Findings -- Appeals -- Existing rules and regulations ratified.

"The said commissioners are also hereby authorized and empowered to create one or more trial board or boards, to be composed of such number of persons as said commissioners may appoint thereto, for the trial of officers and members of said police force; and said commissioners are hereby also authorized and empowered to make and amend rules of procedure before such trial board or boards and to change or abolish any such trial board or boards as they may deem proper;

and the findings of such trial board or boards shall be final and conclusive unless appeal in writing therefrom is made within five days to the Commissioners of the District of Columbia, the hearings on appeal to be submitted either orally or in writing, and the decision of the said commissioners thereon shall be final and conclusive: Provided, That said commissioners shall not be required, in their review of the sentences and findings of such trial board or boards, to take evidence, either oral, written, or documentary, and they shall have power to reduce or modify the findings and penalty of the trial board or boards or remand any case against any officer or member of said police force to such board or boards for such further proceedings as they may deem necessary * * *."

POLICEMEN AND FIREMEN'S RETIREMENT AND DISABILITY

"§ 4-521. Definitions.

* * * *

"(2) The terms 'disabled' and 'disability' mean disabled for useful and efficient service in the grade or class of position last occupied by the member by reason of disease or injury, not due to vicious habits or intemperance as determined by the Board of Police and Fire Surgeons, or willful misconduct on his part as determined by the Commissioners."

REGULATIONS INVOLVED

Manual containing the Rules and Regulations of the Metropolitan Police Department of the District of Columbia approved by Commissioners, District of Columbia, on August 19, 1948.

Chapter II (General Rules)

> "Sec. 4. Members of the force are held to be always on duty, although periodically relieved from the routine performance of it; are always subject to orders from the proper authorities and to call from citizens, and the fact that they may be technically off duty shall not be held as relieving them from the responsibility of taking proper police action in any matter coming to their attention requiring such action."

* * * * *

> "Sec. 69. When questioned by superior officers in connection with matters relating to the official business of the police department, it is the duty of subordinates to respond to such questions as are asked. Refusal to respond to such questioning is in itself a violation of the rules of the department and subject to disciplinary penalties. In any case where a subordinate declines or refuses to answer proper questions relating to his official duties, it will be the duty of the superior officer to make a complete report of the circumstances together with a recommendation for appropriate disciplinary action based on the refusal of the subordinate to make a statement as directed. This in addition to any other charges against the offender which the circumstances may warrant."

* * * * *

Chapter XXV (Disciplinary Procedure)

"Sec. 22. Any member of the Metropolitan police force convicted of any of the following offenses shall suffer such penalty as the board may recommend and as may be approved by the commissioners of the District of Columbia:

* * * * *

"(f) Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his official duties as a Metropolitan police officer to or in the presence of any superior officer, or intended for the information of any superior officer, or making any untruthful statement before any court or to any authorized government official or before a police trial board."

ARGUMENT

I

The record is devoid of evidence establishing that the officer should have been considered for disability retirement rather than removed for misconduct.

In connection with this point, the Court's attention is directed to the following portions of the record:

1. Folder - 0.01 through 0.14; 3A through 3E; 13, 28A, 28B, 34, 34A through 34D, 37A through 37D, 41, 42A, 42B; 46A through 46B; 50A through 50B, 51, 52, 53A through 53F.

2. Tr. 32, 34, 36, 37, 38, 39, 41, 44, 45, 303, 306, 308, 310, 311, 312, 313, 314.

3. Plaintiff's exhibit 4B (medical file of plaintiff); letter of Steven Ostatnik to Dr. Hyman D. Shapiro dated February 18, 1963, and Dr. Shapiro's letter of response dated March 8, 1963.

4. Plaintiff's exhibit 5, page 215.

5. Plaintiff's exhibit 6 (personnel folder).

A - letter from Howard V. Covell, Deputy Chief, Metropolitan Police Department, to the Commanding Officer, Fifth Precinct Station, dated June 20, 1962.

B - letter of Alton D. Young to District of Columbia Board of Commissioners dated January 2, 1964.

6. Decision of United States Civil Service Commission's Board of Appeals and Review, dated December 23, 1963, and contained in both plaintiff's exhibits 6 and 7.

7. Plaintiff's exhibit 9 (Civil Service Appeal), items 3, 5, 6, 7, 8, 11, 12, 13, and item 15 at page 14.

The officer's principal argument on appeal is that he should have been considered for disability retirement and should not have been removed for cause. He notes that he sustained various injuries in the course of his association with the Department and asserts in essence that the combination of these injuries caused a "depression" together with the difficulties "which led to his removal from the force" (brief, 52, 53). The baselessness of this assertion is attested to by two salient circumstances:

1. At no time on an administrative level did the officer claim to have a disability which rendered him incapable of performing police duty, and

2. The record, far from depicting the chain of causation suggested, establishes that the officer's depression was not caused by injuries sustained in the line of duty, but by his acts of willful misconduct. Each of these circumstances will be discussed.

The administrative record establishes beyond peradventure that the officer performed police duty throughout the years from the date of his appointment to the date of his ultimate removal and that he at no time made any request to be retired for disability (folder, 3B through 3E). At the trial board proceedings of April 13, 1962, resulting in the initial recommandation that he be discharged (in lieu of which the

Commissioners imposed a fine of $1500), there was not the slightest suggestion that the officer should be retired for disability rather than subjected to disciplinary action. Instead, his attorney, in his closing argument, represented to the Police Trial Board that the officer "is capable of performing his duties as a policeman [and] * * * wants to continue" (pltf's. ex. 5 at 216). Nor was any suggestion of disability made at the subsequent trial board proceedings of September 19, 1962, which ultimately resulted in the removal action now challenged (pltf's. ex. 1).

Significantly, following appeal to the District of Columbia Commissioners, the officer's attorney, in a letter dated February 18, 1963, requested Dr. Hyman D. Shapiro, the then psychiatrist member of the Board of Police and Fire Surgeons, to provide him with complete medical reports. In a letter of response dated March 8, 1963, Dr. Shapiro proposed a meeting for the purpose of reviewing pertinent medical data (pltf's ex. 4B, item 16). More than a month later, however, at the appeal proceedings before the Commissioners, counsel voiced no disability claim, but instead urged the Commissioners "to allow * * * Mr. Young to remain a policeman" (pltf's. ex. 9, item 15 at 19).

At the later proceedings before the United States Civil Service Commission, the officer, consistent with this previous position, still made no claim of disability, asserting in essence only that his discharge was without rational basis (see Argument II, infra). And after the Civil Service Commission's Appeals Examining Office and Board of Appeals and Review upheld his removal, the officer forwarded another letter to the District of Columbia Commissioners in which he protested the adverse administrative action. But here again his protest was grounded in the asserted unreasonableness and harshness of the decision to sever his connection with the Department, not in any claim of physical or mental disability (see letter of appellant to the District of Columbia Commissioners dated January 2, 1964, and contained in pltf's. ex. 6). In short, not until he filed his action in the court below on October 7, 1965 (almost two and a half years after his discharge), did the officer claim that he should have been retired for disability rather than discharged for cause.

The only logical inference to be deduced from this factual background is that the officer now advances the notion of his asserted eligibility for disability retirement as an afterthought. The scope of the lower court's review of the matter, however, was necessarily confined to the evidence in the administrative record. New York v.

United States, 331 U. S. 284, 335 (1947); Harris v. Tobriner, 113 U. S. App. D. C. 10, 304 F. 2d 377 (1962). Although the officer had ample opportunity to incorporate into the administrative record his claim that he sustained a disability which precluded his performance of police duty and hence allegedly prevented his discharge for cause, he demonstrably failed to do so. His recent contention to this effect comes much too late to be worthy of serious judicial consideration. As the Supreme Court pointed out in Arant v. Lane, 249 U. S. 367, 372 (1919), where, as here, a person challenges his removal from public employment:

> "* * * [O]bvious considerations of public policy made it of first importance that he should promptly take the action requisite to effectively assert his rights * * *."

See also and compare: Board of Trustees of Policemen's Pen. Fund v. Koman, 133 Colo. 598, 298 P. 2d 737 (1956); Davis v. Minneapolis Fire Department Relief Ass'n., 137 Minn. 397, 163 N. W. 743 (1917).

It is urged, however, that the record nonetheless compels an adjudication requiring the officer's retirement for disability, or at least a remand for further administrative proceedings on the issue of disability retirement (brief, at 70). In this regard, the officer points to the testimony of Dr. Shapiro in the court below that, following the

trial board proceedings ultimately resulting in his removal, the physician had psychiatric consultations with him and concluded that he then had a depression which rendered him incapable of performing police duty (brief, 49-50). He then concludes that such depression is directly attributable to the combination of injuries sustained by him in the course of his police career (brief, 52-53). And, oddly enough, he additionally concludes that the injuries and depression were the cause of the misconduct which resulted in his removal for cause from the department (Id., at 53). Clearly, however, this astounding line of reasoning will not justify the requested remand, for the record convincingly discloses that the officer's conclusions go far beyond the evidence. Instead of depicting a depression causing misconduct, the record paints a graphic picture of willful misconduct causing a depression and hence, for retirement purposes, no "disability" at all under the applicable statute (§ 4-521(2), D. C. Code (1967)), which provides that:

> "The terms 'disabled' and 'disability' mean disabled for useful and efficient service in the grade or class of position last occupied by the member by reason of disease or injury, not due to vicious habits or intemperance as determined by the Board of Police and Fire

> Surgeons, or willful misconduct on his part as determined by the Commissioners."[2] [Emphasis added.]

The record, as it relates to Dr. Shapiro's psychiatric consultations with the officer, is replete with evidence that it was the officer's willful misconduct and resulting disciplinary proceedings, not the asserted combination of injuries, which ultimately resulted in the depression now claimed to be compensable. Thus, the psychiatrist testified that, following the misconduct resulting in the trial board proceedings of April 13, 1962, the officer approached him on February 27, 1962, in a depressed and agitated condition, adverting to the recent placement of an assault charge against him (Tr. 36, 308, 314). Although "official" psychiatric consultations did not commence until several months thereafter (following the termination of the September trial board proceedings), the record, as it relates to such consultations, is quite revealing. As a result of these consultations, the psychiatrist was of the view that the officer was depressed "about the difficulties he claimed he had been having from the fact that he had been transferred to a precinct which was a separation center, and * * * was also depressed about the pending [September 1962] charges

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[2] Although quite lengthy in other respects, the officer's brief significantly omits the underscored language when quoting this statutory provision (brief, 61).

[then under appeal to the Commissioners]." When questioned specifically about the significance of the September trial board proceedings as they related to the depression, the psychiatrist was quick to acknowledge a connecting link:

> Q Were you familiar with the fact that on September 19th, 1962 he was before the trial board of the Metropolitan Police Department?
>
> A Yes. I had brought that out.
>
> Q Was this a significant factor in his depression?
>
> A I said it was part of it * * *. [Tr. 312, 313.]

The psychiatrist was also specifically questioned with respect to the relationship of the April trial board proceedings to the officer's depression, and here again the record supplies a significant causal connection:

> Q But you testified as to some diagnosis of him in February, 1962.
>
> A Well, I said he was agitated and depressed at the time.
>
> Q Would that be depressed because of the trouble he had gotten into earlier in 1962 for which he was going to be trial boarded in April, 1962?

A Well, at that time his complaint was that he had been on the force 12 years and recently he was charged with simple assault on January 7, 1962.

Q Would that be the cause of his depression?

A Yes, that could be. [Tr. 314.]

This evidence hardly supports the officer's thesis that he incurred a permanently disabling depression as a result of a combination of injuries sustained over an extended period of time, much less his thesis that his depression was the cause of his misconduct. In short, the record simply does not support the officer's position, but, instead, amply justifies the conclusion that any such depression was occasioned by his apprehension concerning the disciplinary proceedings in which he was involved and, of necessity, the misconduct which gave rise to such proceedings.

The record also clearly establishes that the misconduct which set in motion the chain of events ultimately causing the depression was "willful" within the purview of the applicable statute. Thus, the specific acts of misconduct which, inter alia, the officer was found at the April trial board proceedings to have committed are as follows:

1. "Willfully mistreating or using unnecessary violence toward a person" in that he "* * * without justification or excusable cause, did strike one Helen C. Custer about the face and body and did kick the said Helen C. Custer with his shod foot."

2. Conduct unbecoming an officer in that he "did threaten to kill one Helen C. Custer" and "did live for severals days at a time at apartment 791-A, 1415 Saratoga Street, N. E., with one Helen C. Custer, a married woman not his wife." (Pltf's. ex. 9, items 11, 12.)

And the principal act of misconduct in which the officer was found at the September trial board proceedings to have perpetrated consisted of his "willfully and knowingly making an untruthful statement" in writing pertaining to his official duties as a Metropolitan Police officer (pltf's. ex. 9, items 5, 6). These kinds of misconduct are unquestionably "willful" within the purview of § 4-521(2), D. C. Code (1967), supra.

In sum, it cannot be said that a policeman who engages in the misconduct depicted by this record and thereby sets into motion a chain of events resulting in disciplinary action, discharge, and, ultimately, a depression, may profit from his own wrong by substituting a disability pension for an order of removal.

II

The removal action has a reasonable basis in law and was for such cause as promotes the efficiency of the service.

In connection with this point, the Court's attention is directed to the following portions of the record:

1. Folder - 0.11 through 0.14; 50A through 50B, 51, 52, 53A through 53F.

2. Plaintiff's exhibit 1, pages 10, 11, 14, 15.

3. Decision of United States Civil Service Commission's Board of Appeals and Review, dated December 23, 1963, and contained in plaintiff's exhibits 6 and 7.

4. Plaintiff's exhibit 8:

A - statement of Alton D. Young submitted to Captain John W. Trotter on July 10, 1962, labelled "C" in red pencil.

B - statement of John N. Graff submitted that same date and labelled "A".

C - supplemental statement of Alton D. Young submitted to Captain Trotter on July 18, 1962, and labelled "D".

5. Plaintiff's exhibit 9, items 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13.

The officer additionally challenges the reasonableness of the order of removal. He claims that his removal was ultimately based on a finding of guilty of a single charge of making an untruthful statement pertaining to his official duties, and was erroneous in that he was "off duty" at the time of the occurrence of the incident to which the statement related.[3] Respecting this finding, the record discloses that on July 10, 1962, the officer was involved in an altercation at Wynn's Steak House in Hyattsville, Maryland, and that the matter was investigated by an Officer Fox of the Prince Georges County Police Department who conversed with both combatants (pltf's. exs. 1, 10, 11, 14, 15). The officer told the Prince Georges County Policeman that "he was a D. C. Police officer * * * and * * * was not looking for any trouble * * *" (Id., at 15). Later that same day, in a written statement witnessed by Lieutenant Robert S. Shuttleworth and submitted to Captain Trotter of the Ninth Precinct, the officer twice

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[3]Although advanced on the administrative level, this contention was not renewed in the court below, where the officer claimed only that he should have been retired for disability rather than discharged for cause. Furthermore, although the officer challenges his removal, as upheld by the Civil Service Commission, he did not name the Civil Service Commissioners as parties to his action below. The contention thus does not warrant consideration on appeal. Miller v. Avirom, 127 U. S. App. D. C. 367, 384 F. 2d 319 (1967).

denied categorically having conversed with a police officer following the altercation (see pages 3 and 4 of statement of Alton D. Young contained in pltf's. ex. 8 and labelled "C" with red pencil). The other combatant also made a written statement at the Ninth Precinct Stationhouse that same day in which he made reference to the officer's discussion with a Prince Georges County Police officer (see page 2 of statement of John N. Graff also contained in pltf's. ex. 8 and labelled "A"). In a "supplemental statement" submitted to Captain Trotter more than a week later, the officer admitted the falsity of his earlier assertions (pltf's. ex. 8, document D).

Furthermore, it is plain from the record that the untruthful statement finding did not consitute the only basis for the removal action, as upheld by the Civil Service Commission. Additionally considered was the misconduct which the officer was found at the April trial board proceedings to have engaged in just a short time earlier. The record also shows that the officer was given definite advance notice that his prior misconduct would also be taken into consideration by the Commissioners in determining whether to approve the recommendation for his removal emanating from the September trial board proceedings (pltf's. ex. 9, item 1). And the decision of the Civil Service Commission's Appeals Examining Office and Board of Appeals and Review

both noted that the prior misconduct entered into the ultimate removal action (folder 53C, D, F; pltf's. exs. 6 and 7). The nature of this misconduct was stated in Argument I, supra, and will not be restated here. Clearly, therefore, there is a rational basis for the administrative determination that the officer's removal was for such cause as will promote the efficiency of the service, and hence the removal action should not be judicially overturned. See Meehan v. Macy, 129 U. S. App. D. C. 217, 223, 392 F. 2d 822 (1968); Mendleson v. Macy, 123 U. S. App. D. C. 43, 356 F. 2d 769, 799-800 (1966); Sudduth v. Macy, 119 U. S. App. D. C. 280, 341 F. 2d 413 (1964); Studemeyer v. Macy, 116 U. S. App. D. C. 120, 321 F. 2d 386 (1963); Eustace v. Day, 114 U. S. App. D. C. 242, 314 F. 2d 247 (1962); Carter v. Forrestal, 85 U. S. App. D. C. 53, 175 F. 2d 364 (1949).

The argument that, because he was not "on duty" at the time, the untruthful statement was an improper basis for disciplinary action borders on the frivolous. Rejecting it on the administrative level, the Civil Service Commission's Appeals Examining Office stated:

> "It is our view that the appellant's untruthful statement to Lt. Shuttleworth must be considered as 'pertaining to his official duties as a Metropolitan police officer.' Members of the Metropolitan police force are '. . . always on duty, although periodically relieved from the routine performance of it; are always subject to orders

from proper authorities . . .'
(Chapter II, Section 4, Manual of the Metropolitan Police Department). In addition, 'when questioned by superior officers in connection with matters relating to the official business of the Police department, it is the duty of subordinates to respond to such questions as are asked. . . .'
(Chapter II, Section 69, Manual of the Metropolitan Police Department). When consideration is given to the foregoing it is evident that Mr. Young was 'on duty' when questioned by Lt. Shuttleworth on July 10, 1962. Furthermore, it is equally apparent that if a police officer becomes involved in a fight and a warrant is issued for his arrest that is a matter relating to the 'official business of the police department' regardless of what police force may have jurisdiction over the area where the fight occurred. The maintenance of a police force whose members are law abiding persons is obviously 'the official business of the police department.' * * *"
(Folder 53E -53F; emphasis added.)

And in affirming the decision of the Appeals Examining Office, the Civil Service Commission's Board of Appeals and Review said:

> "* * * As to the materiality of the false statement, the Board must take cognizance of Mr. Young's position as a Metropolitan Police officer who as a law-enforcement officer, was in a sensitive position and was expected to be honest and truthful. By making these false statements, Mr. Young destroyed his effectiveness as a police officer. Under the circumstances, the Board also concurs in the Appeals Examining Office's finding, that on the strength of the sustained charge and the prior record, Mr. Young's removal was warranted * * *."
> [Emphasis added.]

These administrative pronouncements are wholly consistent with the judicially articulated proposition that public officers and employees, by virtue of their positions, must conform to reasonable and ethical standards of personal conduct whether on or off duty. Cf. Carter v. United States, ____ U. S. App. D. C. ____, 407 F. 2d 1238 (1968); Carter v. Forrestal, supra; and see the excellent discussion supported by many case citations in State v. Civil Service Com'n. of City of West Allis, 27 Wis. 2d 77, 133 N. W. 2d 799 (1965). And as is apparent from a recent decision of this Court, such standards apply even more stringently to one "not an ordinary civil servant but * * * a policeman" with duties of a more sensitive nature. Compare Meehan v. Macy, supra, 129 U. S. App. D. C. at 229.

In State v. Civil Service Com'n. of City of West Allis, supra, the court observed, 133 N. W. 2d at 803, that:

> "* * * [A] policeman's failure to live up to acceptable moral standards has a more palpable tendency to undermine public respect for law enforcement than would be the case with many other employees."

And the reasoning of the Supreme Court of New Jersey in Ward v. Keenan, 3 N. J. 298, 70 A. 2d 77, 83 (1949), is strikingly applicable here:

"To insist * * * that the plaintiff * * * could have with impunity refused to obey an emergency that occurred during the period of his leave of absence is to ignore the role in our government of a police officer. For the same reason he was not privileged during his self-styled hiatus to fail to report the commission of any crimes of which he had knowledge or to refuse to divulge such information when so requested by his superior officers. To hold otherwise would permit of conduct adverse to the discipline and morale of a police department that is so vital to the efficient discharge of its duties in the protection of the public: ' * * * The police department of our cities * * * is built upon a plane of public efficiency, which has ordinary truth and morality as its base; and, when these essential elements of public probity be lost, the department shall have lost not only the confidence of the community, but the fundamental mainstay and support which is necessary to its effective and satisfactory operation.' [Martin v. Smith, 100 N. J. L. 50, 52, 125 A. 142, 143 (Sup. Ct. 1924).]" [Emphasis added.]

The instant case even more cogently attests to the validity of the proposition that police officers do not remove themselves from the threat of disciplinary action by the mere circumstance that they happen not to be on active duty when their acts of misconduct occur. In addition to making an untruthful statement, the officer was found to have recently engaged in several other flagrant acts of misconduct (and he at no time voiced a judicial challenge to the sufficiency of the evidence to support such findings). To maintain that the Department may not

discharge the officer on the basis of these multiple infractions is to defy logic and common sense as well as authority.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below upholding the appellant's removal for cause from the Metropolitan Police Department is in all respects correct and should therefore be affirmed.

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August 22, 1969

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,727

ALTON D. YOUNG, Appellant,

v.

WALTER E. WASHINGTON, Commissioner
of the District of Columbia, Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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I N D E X

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by an asterisk.

ARGUMENT

I. Contrary to appellee's contention, Officer Young's depression antedated his alleged misconduct by more than two years and therefore was not caused by said alleged misconduct.

Appellee's brief, p. 24, argues that Officer Young's depression stemmed from his alleged misconduct. The earliest alleged misconduct occurred in January 1962.

As a result of Young's on-duty injury with a D.C. Transit bus on October 6, 1957 a claim was made on his behalf against that company, and he was examined on October 7, 1959 by Dr. Leon Yochelson for D.C. Transit. Dr. Yochelson's report to D.C. Transit dated October 9, 1959 (JA 36A-C) states:

> "he revealed that he has been very irritable towards his wife, children and occasionally to colleagues at work. Also, he has had difficulty in falling asleep and recalls occasional pacing during the night. He has increased his tobacco consumption to about 3 packs in a day."

Dr. Yochelson found that he was "suffering from an emotional depression', but, as might be expected, did not attribute it to the accident for which D.C. Transit was responsible.

Although the officer was depressed after the trial board's action in 1962, there was no indication that he ever recovered from the depression which developed after his original on-duty auto accident on October 28, 1957 as shown in appellant's brief commencing at page 8, which was aggravated by his later severe auto accident on duty which occurred on September 23, 1960 as set forth in appellant's brief at pages 31-36.

Thus this alleged misconduct did not cause his depression.

II. The Board of Surgeons did not make a finding that Young's disability as defined in D.C. Code 4-521(2) was due to "vicious habits", nor did the Commissioners make a finding that his disability was due to "wilful misconduct" as appellee urges, nor did either of them even consider this. Neither did Dr. Shapiro's testimony prove that Young's disability was caused by the Trial Board incidents.

The appellee in his brief at p. 16 quotes D.C. Code 4-521 regarding the definition of "disability" and refers to said definition at various places in Argument I (pp 18-28) urging that this officer's disability came from "vicious habits" or "wilful misconduct". But the Board of Surgeons never made any such finding. Nor did the Commissioners find his disability was due to any wilful misconduct nor did either of them even consider this

despite the fact that the BPFS under the circumstances should have conducted a survey to determine if he was "disabled" according to the definition.

And appellee's brief at pp 13, 14 and 26-27 quoting Dr. Shapiro and attempting to attribute the officer's depression to the trial board incidents because all Dr. Shapiro said in that regard was that "it was part of it' and 'that could be'. (Not that it was.) The rule of the Blohm case and other cases placing the burden on the District of Columbia in this respect is significant.

III. The Police Trial Board was not equipped nor constituted to determine the issue of appellant's disability, which was a medical matter, nor was such issue before it, although appellant sought to offer testimony in this respect.

At various points in his brief, for example at page 9, the appellee states that Officer Young made no claim of disability at the hearing held by the District Commissioners on April 11, 1963 and refers to the trial court findings and "that he at no time made any request to be retried for disability".

The question of his disability which should have been initiated by the Board of Surgeons and the Trial Board was neither equipped nor constituted to try the issue of medical or physical

disability. A person in Officer Young's condition might well be disabled and not realize it particularly the type of disability which Dr. Shapiro later found to exist in this case. See appellant's brief, pp 60-64. In this respect the D.C. Code 4-533 indicates that it is the Commissioners who initiate retirement proceedings, not the officers themselves. It reads in pertinent part as follows:

> "The Commissioners shall consider all cases for the retirement of members and all applications for annuities under sections 4-521 to 4-535. In each case of retirement of a member the Commissioners shall certify in writing the physical condition of the member for whom retirement is sought. The Commissioners shall give written notice to any member under consideration by them for retirement to appear before them and to give evidence under oath." (Emphasis supplied)

Thus, the fact that this officer did not ask for disability retirement should not prejudice his right thereto.

IV. Officer Young's constitutional rights were denied him when he was compelled while under arrest to make a statement regarding an off-duty on-leave incident without benefit of counsel, on threat of suspension. (With regard to this point appellant desires the Court to read Plaintiff's Exhibit 3, U.S. Civil Service Commission transcript for May 31, 1963, pp 23-25.)

Appellee's Argument Point II urges the reasonableness of the order of removal. Appellant contends that it was not only unreasonable as being too severe a penalty but also unconstitutional under the circumstances. Thus, on the morning of July 10, 1962, Officer Young was arrested (at his residence in Maryland) by Prince George's Officer Thornberry on a warrant obtained by Graff for assault, and was advised that Officer Alfred Fox (who had been at ..ynn's) was in difficult/ (regarding the incident). Young was taken to the Hyattsville Police Station, where Lt. Shuttleworth of Precinct #9 was waiting, and after making bond, the officer was taken to Precinct #9 by Lt. Shuttleworth and directed to make a statement regarding the incident. Having been arrested regarding the incident and charged criminally, he requested that he be granted counsel, but was told "that it was my dut/ to make a statement or I would be suspended or charged with failing to make a statement without the benefit of counsel".

(Plaintiff's Exhibit 3, U.S. Civil Service Commission transcript of May 31, 1963, pp 23-25.) (Young was acquitted in Court of the charges of assault on both Custer and Graff and also acquitted by the Trial Board of assault on Graff).

Appellee's brief, p. 17, quotes from what appellee contends is the applicable regulation, namely Police Manual Sec. 69, which reads in pertinent part:

> ". . . . Refusal to respond to such questioning is in itself a violation of the rules of the department and subject to disciplinary penalties. In any case where a subordinate declines to answer proper question relating to his official duties, it will be the duty of the superior officer. . . ."

It is urged that the foregoing section is not applicable to personal matters not involving "official duties", such as were here involved. A contrary interpretation would require an officer to incriminate himself, and raises a question of constitutionality of the regulation. For instance, could Officer Young have been compelled by his superior police officers under this section to reveal the details of personal confessions made in accordance with his religious faith, and if he refused, be suspended, etc.? It is submitted that he could not.

Police officers have constitutional rights and such question was involved in the case of Meehan v. Macy, 129 U.S. App. D.C, 217, 392 F.2d 822 (1968), where a police officer employee of the U.S. Canal Zone Government, appealed his discharge for having printed and distributed an allegedly intemperate, contemptuous and defamatory lampoon of the Governor of the Canal Zone, regarding the Governor's policies in connection with hiring Canal Zone natives as police officers, during a riotous period in 1964. This Court stated at 129 U.S. App. D.C. 227:

> We do not approve the apparent premise of the Appeals Examining Office that an employee of the Government cannot claim the right to both a Government job and freedom of speech. One who enters the service of the government cannot be forced to cede all of his protections from Governmental excesses. Whatever liberties a private employer might have or take, the Government cannot disregard the Bill of Rights merely by calling on its prerogatives to hire and fire employees. . . . But in some respects, at least, their constitutional rights are inviolable notwithstanding their status as Government employees. Recently, in Garrity v. State of New Jersey, 385 U.S. 493, 500, 87 S. Ct. 616, 620, 17 L.Ed.2d 562 (1967), the Supreme Court held that certain constitutional rights were retained by policemen, stating: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." (emphasis added) Assertion of First Amendment rights was mentioned specifically as sharing this constitutional rank.

> (And footnote 29 at 129 U.S. App. D.C. 228 states: See also Sherbert v. Verner,.... (1963) that the Constitution does not permit "liberties of religion and expression...(to) be infringed by the denial of or placing of conditions upon a benefit or privilege.') (and footnote 34 at p. 230 states: "Policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights"- citing the Garrity case).

Thus, the statement which this officer was compelled to make while actually, or in effect, under arrest, pertaining of off-duty on-leave activities outside the District of Columbia, had the effect of violating his right not to incriminate himself under the 5th Amendment. In any event, in view of the fact that he revealed his involvement in the incident at Wynn's, it would seem inconsequential or immaterial as to whether he conversed with Officer Fox or not, particularly since he voluntarily corrected the statement.

In Norton v. Macy, U.S. App. D.C. , (No. 21625, Rehearing denied Oct. 20, 1969), 417 F.2d 1161 (1969), a federal service civil employee sued for reinstatement following his discharge for an alleged homosexual advance against another, where after the employee was arrested for a traffic violation and was taken to the Morals Squad Office and interrogated for two hours concerning activities on the evening in question and his sexual history. This Court, in footnotes 27 and 34 at 418 F.2d 1167, and 1168, referred

to the police investigative tactics as being of 'at least questionable legality'. The Court held in substance that the government had failed to show a relationship between the employee's outside activities and his efficiency as a government employee, and reversed the case, and that (at 417 F.2d 1167):

> Thus, even the potential for the embarrassment the agency fears is minimal. We think the unparticularized and unsubstantiated conclusion that such possible embarrassment threatens the quality of the agency's performance is an arbitrary ground for dismissal.

In the recent U.S. District Court D.C. case of Pope v. Volpe, C.A. 1753-69, the Federal Aviation Agency was ordered to reinstate an employee who had been discharged because his superiors asserted that he had had "sexual relations with a woman other than his wife', the Court relying on the Norton case, supra.

Thus, here, the officer, veteran's preference eligible, (Plaintiff's Exhibit 3, p. 3, entitled "Appeal of Alton D. Young", dated August 30, 1963, which states "We find the appellant is entitled to appeal to the Commission under Section 14 of the Veteran's Preference Act, as amended. . .') was discharged because of an inconsequential statement not pertaining to duty, which he later corrected, and aside from other arguments that this was not sufficient cause for his discharge, was further based upon an unconstitutional deprivation of his rights, and should be reversed.

V. Both of the trial boards before which Officer Young appeared were without jurisdiction and therefore illegal under the Supreme Court case of O'Callahan v. Parker, and his dismissal should be set aside for this reason among others.

Appellee's brief, p. 31, points out that in addition to the guilty finding for the untruthful statement pertaining to his official duties, Young's dismissal was also based on his prior April 1, 1962 trial board finding of misconduct stemming from the alleged assault on one Custer (of which he was acquitted in Court). Both of these trial board appearances were based on off-duty non-service connected incidents, and he was improperly and unconstitutionally brought before the trial board on both occasions, and his dismissal should be vacated and set aside for this reason among others. The U.S. Supreme Court has recently held that an army court-martial had no jurisdiction to try a serviceman for non-service connected crime committed off-post while on leave.

Thus, in O'Callahan v. Parker, 395 U.S. 258, 23 L.Ed.2d 91, 89 S.Ct. 1683 (June 2, 1969), the Court's attitude toward off-duty incidents was shown where the petitioner, a sergeant in the United States Army stationed at Fort Shafter in Hawaii, while on leave with an evening pass and dressed in civilian clothes, broke into a girl's hotel room and assaulted and attempted to rape her. He was apprehended by a hotel security officer who delivered him to the

Honolulu city police for questioning, and after determining that he was a member of the Armed Forces, the city police delivered him to the military police. Following extensive interrogation, he confessed, and he was then charged with attempted rape, housebreaking, and assault with attempt to rape, in violation of Articles 80, 130, and 134 of the Uniform Code of Military Justice, and was tried and convicted by court-martial on all counts. His conviction was affirmed by the Army Board of Review, and subsequently, by the United States Court of Military Appeals. While under confinement at a federal prison in Pennsylvania pursuant to the sentence received in his court-martial, he filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Pennsylvania, alleging, inter alia, that the court-martial was without jurisdiction to try him for nonmilitary offenses committed off-post while on leave, but the District Court denied relief without considering the issue on the merits, and the Court of Appeals for the Third Circuit affirmed (390 F.2d 360).

On certiorari, the United States Supreme Court reversed. In an opinion by / Douglas, Justice, expressing the view of five members of the Court, it was held that the court-martial had no jurisdiction to try the petitioner for the crimes in question, which were not service connected and were committed off-post and while on leave,

and thus to deprive him of his constitutional rights to indictment by a grand jury and a trial by a petit jury in a civilian court, but that he was entitled to trial by a civilian court.

It is urged that on the authority of the O'Callahan case, both trial board proceedings in question were illegal, and appellant's dismissal based thereon should be set aside.

VI. Appellee's challenge to the scope of this appeal is ill founded, because the trial court received in evidence the officer's entire personnel and medical file, and the proceedings before the Civil Service Commission, and this in effect constituted a trial de novo on all issues previously litigated. (With respect to Point VI, appellant desires the Court to read Tr. 2, 324-326.)

Appellee's brief at p. 5 and at p. 30, footnote 3, challenges the propriety of this appeal insofar as it relates to the reasonableness of the order for removal. In this respect, the action of the Court in receiving in evidence Officer Young's entire medical file while he was a member of the Metropolitan Police Department and record of proceedings before the Civil Service Commission in effect constituted a trial de novo of the claims set forth in the complaint as well as before the Civil Service Commission. A proper and adequate consideration of those medical reports as reflected by the statement of the case herein abundantly shows that Officer Young was disabled prior to the separation from the

Metropolitan Police Department or that, at the very least, a determination should have been made by the Board of Surgeons and the Retirement Board to determine whether this disability was incurred in the line of duty or not in the line of duty and when it arose, in other words, whether before or after the trial board charges. Despite the fact that the Court received all the aforementioned material in evidence, the Court did not examine such material (Exhibits 6-9) but proceeded to rule almost immediately. (Tr. 2, 324-326)

VII. The provision of the Police Manual that an officer is always "on duty" merely means that he is always subject to being called to duty but not that everything which he does while on leave and outside of the District of Columbia embraces duty.

Appellee's brief does not directly respond to the argument in appellant's point II in appellant's brief, pp. 54-60, to the effect that the Police Trial Board improperly found appellant guilty of ". . . . making an untruthful statement pertaining to his official duties as a Metropolitan police officer. . . ." for the obvious reason that the argument contained therein is sound and correct. Appellee does, however, in his brief at pp. 32-35 discuss the meaning of "on duty", and at p. 17 quotes from the Police Manual to the effect that members of the force are held to

be "always on duty" and subject to orders from proper authorities and call from citizens. This merely means that an officer is always subject to being called to duty when needed, but it does not purport to, and could not legally authorize Officer Young to perform official police functions in another jurisdiction, namely Maryland, where the incident giving rise to his dismissal occurred, and he was not "on duty" at the time of said incident. The validity of this position can be clearly illustrated.

Thus, assume for argument's sake, that the District of Columbia Government was subject to suit for torts of its agents (such as the United States is under the Federal Tort Claims Act) including police officers, committed in the scope of their employment, and Officer Young had injured someone during the incident in question. Officer Young could not, under such circumstances, even by the wildest stretch of one's imagination, be deemed to be acting within the scope of his employment by the District of Columbia so as to make it liable under the doctrine of respondeat superior, despite the aforementioned provision of the police manual. If he was not "on duty" for purposes of liability of his employer under such a factual situation, then he was not "on duty" for the purposes of making an untruthful statement pertaining to his official duties, of which he was found guilty. If the officer is always

"on duty", then how could he be legally found guilty of a police regulation on the charge "that he failed to carry his service revolver while off duty", as recited at page 7 of appellee's brief, and why would such a regulation be needed?

The word "pertain" means to belong, or pertain, whether by right of nature, appointment, or custom; to relate, as things relating to life. People v. Board of Directors, 51 N.E. 198, 199, 174 Ill. 177. Church of the Holy Faith v. State Tax Commission, 48 P.2d 777, 779, 39 N.M. 403. Chicago Theological Seminary v. State, 188 U.S. 662, 23 S. Ct. 366, 47 L.Ed. 641.

The word 'relate' is synonymous with "pertain" and presupposes another subject matter, and has been defined as meaning to stand in relation or to have reference or regard. Van Schaik v. Marinelli, 276 N.Y.S. 241, 243 App. Div. 7.

Engaged in performance of "official duties" within the meaning of statutes relating to resisting federal narcotics officers while in performance of official duties is simply acting within scope of what agent is employed to do, and the test is whether the agent is acting within that compass or is engaging in a personal frolic of his own. U.S. v. Heliczer, CANY, 373 F.2d 241, 245.

Thus the words "on duty" as used in the Police Manual do not literally mean what the words themselves might seem to imply.

CONCLUSION

This case should be reversed and remanded to the Commissioner Appellee with instructions either to retire the appellant for disability incurred in the performance or aggravated by duty, or in the alternative for a Board of Surgeons survey and a hearing before the retirement board to consider his disability retirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed, postage prepaid, to David Sutton, Attorney for Appellee, Assistant Corporation Counsel, District Building, Washington, D.C. 20004, this 10TH day of March, 1970.

/s/ CARLETON U. EDWARDS, II
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CONCLUSION

This case should be reversed and remanded to the Commissioner Appellee with instructions either to retire the appellant for disability incurred in the performance or aggravated by duty, or in the alternative for a Board of Surgeons survey and a hearing before the retirement board to consider his disability retirement.

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